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Supreme Court of the United States

October Term, 1984

CAPITAL TELEPHONE COMPANY, INC., PETER A. BAKAL, TRI-CITIES TELEPHONE COMPANY, INC., and CAPITAL DISTRICT ANSWERING SERVICE, INC.,

Petitioners,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KEITH J. ROLAND*
USHER FOGEL
EMILIO A.F. PETROCCIONE
Attorneys for Petitioners

ROLAND & FOGEL
1 Columbia Place
Albany, New York 12207
(518) 434-8112

* *Counsel of Record*

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

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Questions Presented for Review.

1. Whether the largest public utility in the State of New York is to be totally free from responsibility or liability for its anticompetitive conduct?

2. Whether the anticompetitive activities of New York Telephone Company, a regulated public utility, are protected from federal antitrust scrutiny under the doctrine of state action immunity as applied under the laws of the State of New York?

3. Whether, in applying the standard enunciated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the anticompetitive actions of New York Telephone Company were conducted pursuant to a "clearly articulated and affirmatively expressed state policy" in the State of New York, and whether said policy was "actively supervised" by the State of New York?

4. Whether the doctrine of state action immunity can be applied where the anticompetitive activities are not compelled by direction of the State acting as a sovereign?

5. Whether enabling a regulated telephone company to engage in anticompetitive activities conflicts with the official policy of the State of New York which fosters and promotes competition in the telephone industry?

6. Whether the doctrine of state action immunity can be used to shield the anticompetitive activities of a regulated telephone company from antitrust liability, where the New York Court of Appeals, the State's court of last resort, has concluded that the State's regulation of the telephone industry does not bar a private plaintiff from seeking redress against a telephone company under state antitrust laws?

7. Whether the doctrine of state action immunity is available to the telecommunications industry which is technologically and economically a national network with interdependent components?

8. Whether regulation of interconnection arrangements between local exchange carriers and radio telephone utilities is a matter subject to state control and jurisdiction?

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Opinions Below

The majority and dissenting opinions of the United States Court of Appeals are reported at _____ F. 2d _____ (2nd Cir. 1984). They are appended hereto as Appendix A. The opinion of the United States District Court for the Northern District of New York is not reported but is captioned *Capital Telephone Co., Inc. v. New York Telephone Co.*, No. 82-CV-789 (N.D.N.Y., January 24, 1984), and is appended hereto as Appendix B.

Jurisdiction

The judgment sought to be reviewed was made and entered on December 18, 1984. The judgment appears only in the opinion. There was no separate judgment. The statutory provisions which confers on this Court jurisdiction to review the judgment in question is 28 U.S.C. Section 1254(1).

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. Section 1:

> Section 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. Section 2:

> Section 2. Monopolizing trade a felony; penalty
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by punishment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Clayton Act, 15 U.S.C. Section 13:

The pertinent text is set forth in Appendix C, which is annexed hereto.

Statement of the Case

In this case, the Second Circuit held that New York Telephone Company, a regulated monopoly, is immune from liability for its anticompetitive conduct, no matter how egregious or destructive that conduct. The Court's ruling was in direct conflict with the holding of the New York State Court of Appeals, which affirmatively stated that the public policy of the State of New York is *not to* immunize utilities from antitrust scrutiny.

The Second Circuit's decision also runs counter to the well established principle that telephone utilities are fully subject to antitrust liability, as witnessed by numerous antitrust cases against AT&T which have come before the Supreme Court and been upheld on jurisdictional grounds. Indeed, the Second Circuit, in granting New York Telephone immunity, has accepted the very same arguments AT&T made to Judge Harold Greene in the landmark Justice Department antitrust suit. Those arguments were specifically rejected by Judge Greene and by this Court.

As a matter of public policy, this Court should not countenance the granting of *carte blanche* to New York State's most powerful public utility to destroy its competitors, cross-subsidize its services, and otherwise act contrary to the public interest.

The petitioners consist of three radio common carriers offering a variety of radio-telephone and paging services in upstate New York, and one non-regulated telephone answering service. Specifically, Capital Telephone Company, Inc. (Capital) and Peter A. Bakal (Bakal) offer one-way paging and two-way mobile radio services in Albany, Schenectady, and Troy, New York; Peter A. Bakal also offers air-to-ground radio telephone service in that area.* Tri-Cities Telephone Company, Inc. (Tri-

* In 1983, Peter A. Bakal transferred his business, assets, and certificates to Hudson Mohawk Telephone Company, Inc., an affiliated corporation.

Cities) offers two-way marine mobile radio services on portions of the Hudson and Mohawk Rivers and Lake George, New York. Capital District Answering Service, Inc. provides non-regulated telephone answering services in the Capital District region. Petitioners Capital, Bakal and Tri-Cities are regulated by the Federal Communications Commission (FCC) and, prior to July of 1984, by the New York State Public Service Commission (PSC).**

The defendant New York Telephone Company is a telephone corporation organized under the laws of the State of New York and is subject to the jurisdiction of the FCC and the PSC.

This action was instituted by petitioners filing a complaint in the United States District Court for the Northern District of New York on July 27, 1982, alleging that New York Telephone had engaged in a number of anticompetitive acts designed to injure petitioners' business and property, which acts violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 & 2, and Sections 1 and 2 of the Clayton Act, 15 U.S.C. Section 13. Jurisdiction was conferred on the United States District Court for the Northern District, the court of original jurisdiction, pursuant to 28 U.S.C. Section 1337(a).

Generally, petitioners charged that the defendant offered and provided certain needed services to petitioners' competitors which it did not offer to provide to the petitioners, and that it provided services to petitioners' competitors (including itself) on more favorable terms than those offered to petitioners. Some of the anticompetitive practices complained of included charging petitioners for incoming and outgoing services and circuit installation while their competitors were not

** Pursuant to Chapter 564 of the Laws of 1984, Radio Telephone companies were deregulated as of July 27, 1984.

so charged; and requiring petitioners to pay for radio tie lines, paging numbers and mobile numbers while their competitors (including the defendant) were not.

After issue had been joined, New York Telephone Company moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) seeking dismissal of the complaint for failure to state a claim upon which relief could be granted. By Memorandum Decision and Order issued on January 24, 1984, Senior Judge James T. Foley granted the motion and held that the anticompetitive actions of New York Telephone were protected from antitrust liability by the doctrine of state action immunity. A judgment in favor of New York Telephone dismissing the complaint was filed in the United States District Court for the Northern District on January 24, 1984.

By Notice of Appeal timely filed on February 14, 1984, the petitioners appealed from the Judgment of the District Court to the United States Court of Appeals for the Second Circuit. By decision issued on December 18, 1984, the Court of Appeals, over a dissent by Judge Pierce, affirmed the judgment of the District Court.

The Second Circuit held that New York Telephone's actions "are protected from antitrust liability by state action immunity according to the standards set forth by the Supreme Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)" (Appendix A, p. 2a). In applying the *Midcal* standard, the Court of Appeals concluded that the broad state regulatory scheme, state judicial decisions and recent state legislative action* evidenced a clearly articulated and affirmatively expressed policy by the State of New York to displace competition with

* The Circuit Court cited enactment of Chapter 414 of the Laws of 1981, which deregulated telegraph corporations (but not telephone corporations) as proof the State Legislature wished to keep telephone corporations free from anti-trust liability. However, the Court ignored Chapter 564 of the Laws of 1984 which specifically deregulated radio telephone utilities such as the plaintiffs.

regulation in the telephone industry. The Court further found that the general regulatory statutes in New York constituted "active supervision" under *Midcal* (Appendix A, pp. 21a-22a).

Both the District Court and the Circuit Court did not address the issue of whether a violation of the Sherman Act occurred; but for purposes of analysis it was assumed by the Court of Appeals that violations of the antitrust laws had occurred (Appendix A, p. 6a).

Specifically rejected by the Court of Appeals was the view expressed by the United States Court of Appeals for the Fifth Circuit in *United States v. Southern Motor Carriers Rate Conf., Inc.*, 702 F.2d 532 (5th Cir., Unit B, 1983) (*en banc*), *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984), that state action immunity would not be conferred on a private party unless the challenged activities were "compelled" by the State acting as sovereign (Appendix A, p. 11a, fn. 3). In the Court's view all that is required is a reasonable relationship between the challenged restraints and the state policy (Appendix A, p. 19a).

In finding that the regulatory scheme in New York, as codified in the New York Public Service Law, was intended to displace the antitrust laws and confer antitrust immunity on public utilities in New York, the Second Circuit acknowledged that the New York Court of Appeals in *Capital Telephone Co. v. Pattersonville Telephone Co.*, 56 NY 2d 11, 18 (1982) had reached the opposite conclusion, and had "interpreted the application of the state antitrust laws to the Public Service Law differently" (Appendix A, p. 25a, fn. 7).

In *Pattersonville*, the New York Court of Appeals held that a party injured by a utility's anticompetitive conduct would *not* be barred from seeking redress under the state antitrust laws, even where the challenged activities were approved by the New York State Public Service Commission.

Finally, the Second Circuit rejected the contention that the doctrine of state action immunity is inapplicable to the telecommunications industry. In the Court's view, because Congress has not preempted the field of telecommunications regulations, as demonstrated by the extensive regulatory schemes in each state, there is no conflict between the interests of the State and Federal governments. In the absence of the intent to preempt, the doctrine of Federalism required acceptance of the state's circumvention of the antitrust laws (Appendix A, p. 24a).

A dissenting opinion by Judge Pierce concluded that New York Telephone Company's anticompetitive activities were not "protected from federal antitrust scrutiny by state action immunity" (Appendix A, p. 26a). The legislative scheme codified in the Public Service Law, upon which the majority relied, was, in Judge Pierce's view, too vague to rise to the standard of the clearly articulated and affirmatively expressed state policy needed to confer state action immunity (*Id.*, also p. 31a).

Judge Pierce also placed great emphasis on the explicit holding by the New York Court of Appeals in *Pattersonville, supra* (Appendix A, p. 26a). Since the New York Court of Appeals permitted state antitrust scrutiny of the anticompetitive activities of a telephone company, Judge Pierce reasoned that the New York Court of Appeals necessarily concluded that New York State's decision to "regulate the telephone industry is not inconsistent with the principles of competition." In view of this holding, Judge Pierce held that "the conduct challenged here cannot reflect an affirmative state policy and hence is not exempt from federal antitrust scrutiny" (Appendix A, p. 27a).

POINT I

Granting State Action Immunity Where There Is No Clearly Articulated And Affirmatively Expressed State Policy To Displace The Antitrust Laws Conflicts With The Standard Previously Enunciated By This Court In *California Retail Liquor Dealers Association v. Midcal*, 445 U.S. 97 (1980).

The controlling standard for applying the doctrine of state action immunity was provided in *California Retail Liquor Dealers Association v. Midcal*, 445 U.S. 97 (1980) where this Court held that anticompetitive behavior would only be shielded from antitrust scrutiny when the following conditions were met:

> First, the challenged restraint must be "clearly articulated and affirmatively expressed as State policy"; second, the policy must be "actively supervised by the State itself." *Midcal, supra*, at 105 (quoting *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 at 410 (1978) (plurality opinion)).

Under challenge, in *Midcal*, was a California State law which required wine producers and wholesalers to file fair trade contracts and price schedules with the State. All wholesale transactions in the wine industry were then governed by these contracts and price lists (445 U.S. at 99-100). This Court in *Midcal* found that an affirmatively expressed State policy did exist because the legislative policy in California stated forthrightly that the purpose of the legislation was to permit resale price maintenance, 445 U.S. at 105.

In applying the first standard of the *Midcal* test in this action, the Second Circuit admitted it could find no specific language contained in any statute or official document proclaiming New York's intent to displace competition with regulation in the telecommunications industry. The Court further noted that determining the

existence of such a policy was difficult because of "the Legislature's failure to state clearly its intent to control the field" (Appendix A, p. 13a). Likewise, the District Court had concluded that "New York State's statutory scheme for the regulation of the telecommunications industry does not contain specific language stating an intent to displace competition" (Appendix B, p. 41a). Thus, neither lower court discovered specific authorization immunizing the particular challenged anticompetitive activities. Nevertheless, the Second Circuit ruled that the first part of the *Midcal* test was satisfied.

To support its determination that there existed in New York State an affirmatively expressed State policy to displace the antitrust laws with regulation, the Second Circuit turned to the general statutory provisions of the Public Service Law (Appendix A, pp. 13a-14a). However, as Judge Pierce noted in his dissenting opinion, the statutory provisions of the Public Service Law relied upon by the majority deal primarily with general supervisory powers of the Public Service Commission which can be exercised in the public interest. This vague mandate noted Judge Pierce "cannot satisfy the requirement of *Midcal* that anticompetitive conduct, to be exempt, must be *clearly articulated and affirmatively expressed* as State policy" (Appendix A, p. 26a). See also *Cantor v. Detroit Edison*, 428 U.S. 579 (1976).

Additionally, the majority relied upon the decision of the New York State Legislature to deregulate telegraph corporations in 1981. The majority inferred that since regulation of telephone companies was still maintained, this further evidenced state policy to displace competition in the telephone industry (Appendix A, at p. 17a).* Again, however, there was no specific declaration

* The Court of Appeals did not refer to Chapter 564 of the Laws of 1984, which deregulated the specific radio telephone services at issue in this case.

by the Legislature in its decision to deregulate telegraph corporations that it desired to displace competition in those areas where regulation was maintained.

Petitioners respectfully submit that the indirect and vague sources relied upon by the majority cannot be used to support a holding that a clearly articulated and affirmatively expressed State policy to displace regulation with competition exists; petitioners further submit that application of such a standard conflicts with the controlling test enunciated by this Court in *Midcal*. This is particularly true since the New York State Court of Appeals has held, in the *Pattersonville* case, that New York utilities are *not* immune from antitrust liability.

POINT II

Granting State Action Immunity Where There Is No Active Supervision By The State Of The Challenged Anticompetitive Activities Conflicts With The Standard Previously Enunciated By This Court In *Midcal*.

The second prong of the *Midcal* test requires that there be active supervision of the challenged anticompetitive behavior by the State itself, *Midcal*, 445 U.S. at 105. Under the facts of the *Midcal* decision, this Court emphasized that active supervision was not present because the State did not actively review the challenged anticompetitive behavior. The State of California did not assess the propriety or reasonableness of the fair trade contracts nor did it establish price schedules, *Midcal*, 445 U.S. at 105-6. Since there was no direct supervision of the challenged conduct, immunity from antitrust scrutiny could not be conferred.

The Court of Appeals in the instant case held that active supervision by the State was present. However, once again, the majority relied entirely upon the general

regulatory framework set forth under the Public Service Law, and did not refer to any specific actions taken by the State or the Public Service Commission which authorized the challenged practices of New York Telephone (Appendix A, p. 21a). In fact, no such active supervision exists. For example, neither the Legislature nor the PSC has directed nor authorized New York Telephone to give a division of revenues or EAS settlement to petitioners' competitors but not to the petitioners. Similarly, neither the Legislature nor the PSC has directed or actively supervised New York Telephone's discrimination against the petitioners.

The use of general regulatory statutes to meet the "active supervision" standard conflicts with and flies in the face of the much stricter test established by this Court in *Midcal.*

POINT III

The Court of Appeals' Finding That There Is No Need That The Challenged Anticompetitive Activity Be Compelled By The State Conflicts With The Standards Previously Enunciated By This Court.

In *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), this Court declared that the doctrine of state action immunity would only be available to a private defendant where the challenged restraint on competition was compelled by the State as sovereign. As this Court specifically held:

> "It is not enough that . . . anti-competitive conduct is 'prompted' by State action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign" *Goldfarb, supra,* at 791.

In its subsequent decision in *Midcal*, this Court reaffirmed its adherence to the compulsion requirement enunciated in *Goldfarb*. This was evidenced by the fact that this Court cited *Goldfarb* with approval, and even restated the *Goldfarb* compulsion rule verbatim. See 445 U.S. at 104 quoting 421 U.S. at 971. (See also 445 U.S. at 105 fn. 8). Consequently, the compulsion rule first enunciated in *Goldfarb* is still controlling.

Nonetheless, the Court of Appeals has refused to apply the compulsion requirement. It concludes that the Supreme Court "does not intend that compulsion be required" (Appendix A, p. 12a, fn. 3). In its view, as long as the challenged restraints are reasonably related or contemplated by the state policy, then the *Midcal* test can be met (Appendix A, p. 19a). This rejection of the compulsion requirement is inconsistent with the prior decisions of this Court in *Midcal* and *Goldfarb*.

POINT IV

The Second Circuit's Rejection Of The Requirement That The Challenged Anticompetitive Activity Must Be Compelled By The State Conflicts With The Decision Of The Fifth Circuit Court Of Appeals.

The Court of Appeals for the Second Circuit has expressly rejected the compulsion requirement in determining whether the doctrine of state action immunity will apply (Appendix A, p. 11a, fn. 3). This decision is in direct conflict with the holding of the United States Court of Appeals for the Fifth Circuit as expressed in *United States v. Southern Motor Carriers Rate Conf., Inc.*, 702 F. 2d 532 (Fifth Circuit, Unit B, 1983) (*en banc*), *cert. granted* 52 U.S.L.W. 3891 (U.S. June 11, 1984).

In *Southern Motor Conference*, the Fifth Circuit specifically considered whether the compulsion requirement was necessary for a finding of state action immunity for a private party. The Fifth Circuit ruled in the affirmative, explaining that the standards enunciated in *Midcal* could only make sense if a compulsion requirement was included. Eliminating the compulsion requirement where private parties are involved would undermine the theoretical foundation upon which the state action doctrine was first established:

> . . . the Supreme Court in *Goldfarb* could not possibly have been more clear in imposing a compulsion requirement on private parties. The very basis of the court's holding was that compulsion was lacking; having made that determination, the court reached no other issues, including whether the state had authorized the Bar Association's action. More importantly, reading a compulsion requirement out of the private party state action doctrine would require a complete reformulation of the theoretical foundations for state action first established in *Parker*. 702 F. 2d at 540.

As the Fifth Circuit further explained:

> In the context of private parties, the first *Midcal* standard makes sense only if it includes a compulsion requirement. This is because we do not see how a private party can carry out a clearly articulated and affirmatively expressed State Policy when it is left to the private party to carry out that policy or not as he sees fit. 702 F. 2d at 539.

There exists an obvious conflict between the Fifth and Second Circuits on this pressing question. This Court's recent granting of certiorari in *Southern Motor Conference* is, we believe, indicative of the importance attached by this Court to this compelling antitrust issue. We respectfully submit that this conflict should be resolved by this Court.

POINT V

The Court Of Appeals' Failure To Adhere To The Interpretation Of New York State Law Provided By The Highest Court In New York State Departs From The Law Established In Previous Decisions By This Court.

The Second Circuit's ruling that New York Telephone be granted state action immunity was based on erroneous interpretations of New York State law. In arriving at the conclusion that the affirmative policy of New York is to exempt utilities from antitrust liability, the majority expressly rejected the holding set forth by the New York Court of Appeals in *Capital Telephone Co. v. Pattersonville Telephone Co.*, 56 N.Y. 2d 11 (1982). In that leading case, the State's highest court "explicitly held that the State Public Service Commission's approval of a practice challenged as anticompetitive will not preclude a private plaintiff's state antitrust action attacking that practice" (Appendix A, p. 26a). By this ruling, the New York Court of Appeals necessarily determined that it was *not* the public policy of the State of New York to displace competition and grant immunity from the antitrust laws; nor were the principles of competition inconsistent with the decision of the State to regulate the telephone industry (Appendix A, pp. 26a-27a). New York State's antitrust law, the Donnelly Act (General Business Law Section 340) is governed by the same standards developed under the federal antitrust laws (*Hsing Chow v. Union Centr. Life Ins. Co.*, 457 F. Supp. 1303, E.D.N.Y., 1978).

The majority admitted that its interpretation of State law differed from the view expressed by the New York Court of Appeals:

> "We note that New York's courts have interpreted the application of State antitrust laws to the Public

Service Law differently" (Appendix A, p. 25a, citing *Capital Tel*).*

Nonetheless, as Judge Pierce stated in his dissenting opinion, it is the longstanding rule of this Court that "the interpretation of a state's law by the highest court of that state is conclusive" (Appendix A, p. 32a, fn. 2). This principle is codified in a number of longstanding cases. See *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960); *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 337 (1944); *Sutter Butte Canal Co. v. Railroad Commission*, 279 U.S. 125, 139 (1929). A state's interpretation of its own statutes should be accepted by federal courts except in a situation where such interpretation would frustrate a constitutional right. *Indiana Ex. Rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). No such situation exists in the case at bar.

Under precedent set by this Court, Federal courts must defer to the interpretation of State law provided by State courts. Permitting Federal courts to overrule or ignore interpretation of State law by a State's highest court will create great confusion and undermine the authority which has been traditionally relegated to State courts. We believe this Court should correct the Second Circuit's departure from established precedent.

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* The Second Circuit found that the Legislature "viewed continued regulation of the telephone industry as necessary to displace competition in the public interest" (Appendix A, p. 17a). However, New York Telephone itself would now disagree. As a result of passage of Chapter 564 of the laws of 1984, New York Telephone finds: "Clearly, the intent of the Legislature in enacting this law, as well as the intent of the Commission in suggesting it, was to replace regulation with free market forces." See *Pleading* submitted by New York Telephone to the PSC, March 5, 1985, attached as Appendix G, at pp. 91a and 92a.

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POINT VI

Shielding The Anticompetitive Activities Of A Telephone Company From Scrutiny Of The Antitrust Laws Conflicts With The Official Regulatory Policy Of The State Of New York.

The central underpinning to the Court of Appeals' ruling was its finding that there was an affirmative policy to displace competition with regulation in the telephone industry in New York State. However, violations of the antitrust laws directly conflict with the official regulatory policy of New York, which favors the enhancement and promotion of competition in all sectors of the telecommunications industry. As Judge Pierce observed in his dissenting opinion:

> Moreover, to the extent that New York Telephone's conduct might actually violate the Sherman Act, that conduct would appear to directly conflict with New York State's regulatory policy. This conclusion follows from two facts. First, as all parties concede, the Public Service Commission seeks to promote competition in all aspects of the telephone industry. See Testimony of Paul Gioia, Chairman, Public Service Commission of the State of New York, before Legislative Commission on Science and Technology and Assembly Committee on Corporations, Authorities, and Commissions, February, 1982. Thus, to the extent that the Public Service Commission has approved practices challenged herein, that decision logically would represent at most a determination that such practices are not anticompetitive. It would not imply that the PSC considers a certain level of anticompetitive behavior desirable. (Appendix A, pp. 31a-32a).

The testimony of Paul L. Gioia is set forth in this petition as Appendix D.

The extent to which competition has been promoted by the PSC is explained in further detail in the Argument of the Brief of the Petitioners to the United States Court of

Appeals for the Second Circuit dated April 4, 1984, reprinted in part, as Appendix E.

There is no public policy in the State of New York to allow utilities unfettered freedom to violate antitrust laws and destroy their competitors. Thus, victims of utility abuse are entitled to seek redress in at least one forum. That forum is *not* the Public Service Commission, since state court decisions have repeatedly held "The PSC is not the enforcer of the antitrust laws." *Tele/Resources v. PSC*, 58 AD 2d 406 (3rd Dept., 1977), *lv to app den*, 43 NY 2d 647 (1978); *Westchester Mobilfone v. PSC*, 72 AD 2d 895 (3rd Dept., 1980).

A complaint of anticompetitive conduct will not even be considered by the PSC. An example of this is Appendix F, correspondence between Keith J. Roland, counsel for Alternative Communications Company, and the PSC. As the initial letter indicates (Appendix F. p. 81a), a complaint was submitted to the PSC regarding anticompetitive business practices by Rochester Telephone Company, a regulated telephone utility. The letter alleges that through its practices, the utility was conferring an undue competitive advantage upon its unregulated subsidiary. In response, by letter dated December 21, 1984, the Assistant to the Chairman of the PSC indicated that the state agency "does not have responsibility for the enforcement of the antitrust laws"; therefore, it would not institute the investigation requested by Mr. Roland (Appendix F, p. 87a).

Since the PSC considers enforcement of antitrust laws beyond its jurisdiction, and since it is absurd to believe that the State of New York would allow New York Telephone—or any other utility—the unlimited freedom to stamp out the competition authorized and encouraged by the PSC, injured competitors must be granted access to antitrust courts for relief. Under the Second Circuit's decision, this opportunity for redress does not exist.

POINT VII

The Application Of The Doctrine Of State Action Immunity To The Telephone Industry Conflicts With Principles Of Federalism.

The federal antitrust laws represent fundamental national policy aimed at promoting competition in our economy (Appendix A, p. 7a). Through the doctrine of state action immunity, states have been allowed to pursue policies which would otherwise conflict with the antitrust laws. Such immunity "is based principally on considerations of federalism" (Appendix A, p. 27a). However, in recent judicial decisions involving the telecommunications industry, serious questions have been raised concerning the applicability of the state action doctrine to an industry which is national in scope and comprised of interdependent components. This view was given its most serious expression in the landmark Justice Department antitrust suit against AT&T, by Judge Harold Greene in *U.S. v. AT&T*, 552 F. Supp. 131 (D.C.D.C., 1982), *aff'd* 103 S.Ct. 1240 (1983), wherein the District Court held that state action immunity is unavailable as a defense in antitrust actions involving the telecommunications industry.

Judge Greene examined the origin of the state action doctrine, and concluded that while the principle of federalism would allow states a certain degree of sovereignty with respect to economic activity within their jurisdiction, federalism should not be expanded to permit application of the state action doctrine in matters involving the telecommunications industry:

> The telecommunications network is, technically and economically, a national network with interdependent components (Footnote omitted).

> Congress has recognized this interstate characteristic, with its impacts on the national economy and the national defense by exercising its power under the Commerce Clause to reserve federal control over interstate communications. *North Carolina Utility Commission v. FCC* [537 F.2d 787]. It may be doubted that the *Parker* doctrine may reasonably be extended to this kind of an activity which is national par excellence. 552 F. Supp. at 158.

Judge Pierce, in his dissenting opinion, noted the decision in *U.S. v. AT&T, supra*, and commented that there "may be limits other than those expressed in *Midcal* on a state's ability to impose a regime of economic regulation that conflicts with the principle of free competition mandated by the Sherman Act" (Appendix A, p. 27a, fn. 1).

Immunizing anticompetitive behavior in an industry which is "national par excellence" (552 F. Supp. at 158) confers authority to the State in the area of interstate commerce. Such a grant of power conflicts with the reasonable application of the federalism doctrine and improperly undermines the national economic policy of this country, as protected by the federal antitrust laws. This presents a substantial Federal question which should be resolved by this Court.

POINT VIII

The Subject Matter At Issue Is Outside The Jurisdiction Of The State Of New York, And The State Cannot Confer Antitrust Immunity.

The subject matter of many of the defendant's anti-competitive acts involves the nature of interconnecting arrangements between New York Telephone and competing radio telephone utilities. While the PSC has from time to time considered some of those issues, the

entire subject matter is governed by the Federal Communications Commission and *not* by state agencies. See *Radio Relay Corp. v. FCC*, 409 F. 2d 322 (2nd Cir., 1969), generally known as the FCC's "Guardband" Decision and *Applications of Gerard T. Uht*, 35 FCC 2d 140 (1972), *recon den* 37 FCC 2d 326, *aff'd sub nom. Pocket Phone Broadcasting Service v. FCC*, 538 F. 2d 447 (CA DC, 1976).

New York Telephone would agree with this proposition. In response to interrogatories concerning its dealings with non-regulated radio telephone operations in the general rate case now pending before the New York PSC, the defendant stated "The question of whether the company charges itself for the regulated services and facilities used in providing mobile services is now entirely a question of federal law" (See Appendix G at p. 93a).

New York Telephone's failure to properly charge itself for those services and facilities is set forth at paragraph 16(d) of the complaint as one of the challenged anti-competitive acts.*

Thus, since the conduct complained of was beyond the ability of the State to approve, the defendant cannot claim the benefit of State Action Immunity.

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* Paragraph 16(d) reads as follows:

> "Defendant has failed and refused to provide monopoly telephone services and facilities to plaintiffs on the same terms and conditions under which it provides such services and facilities to itself for the conduct of its competitive radio business."

CONCLUSION

This Court Should Grant Certiorari, And Reverse The Judgment Below.

Respectfully submitted,

KEITH J. ROLAND
USHER FOGEL
EMILIO A.F. PETROCCIONE
Attorneys for Petitioners

ROLAND & FOGEL
1 Columbia Place
Albany, New York 12207
(518) 434-8112

APPENDIX A
Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 7 — August Term, 1984

(Argued: August 31, 1984 Decided: December 18, 1984)

Docket No. 84-7176

CAPITAL TELEPHONE COMPANY, INC., PETER A. BAKAL, TRI-CITIES TELEPHONE COMPANY, INC., and CAPITAL DISTRICT ANSWERING SERVICE, INC.,

Plaintiffs-Appellants,

v.

NEW YORK TELEPHONE COMPANY,

Defendant-Appellee.

Before:

KAUFMAN, MESKILL and PIERCE, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Northern District of New York, Foley, *J.*, finding that state action immunity protected New York Telephone Company from liability under the federal antitrust laws.

Affirmed. Judge Pierce dissents in a separate opinion.

Appendix A—Decision of the United States Court of Appeals for the Second Circuit.

KEITH J. ROLAND, Albany, New York (Emilio A.F. Petroccione, Roland & Fogel, Albany, New York, of counsel), *for Plaintiffs-Appellants.*

WALTER C. REID, New York, New York (John M. Clarke, Gerald E. Murray, New York, New York, of counsel), *for Defendant-Appellee.*

MESKILL, *Circuit Judge:*

This is an appeal from a judgment entered in the United States District Court for the Northern District of New York, Foley, *J.*, granting defendant's motion for judgment on the pleadings and dismissing plaintiffs' claims. Because we conclude that defendant's actions are protected from antitrust liability by state action immunity according to the standards set forth by the Supreme Court in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), we affirm.

BACKGROUND

A. *Facts*

The plaintiffs are a number of Radio Common Carriers (RCCs) or Radio Telephone Utilities (RTUs) which provide radio-telephone and paging services in upstate New York. Capital Telephone Company, Inc. (Capital) and Peter A. Bakal (Bakal), both RCCs, offer one-way paging and two-way radio services in Albany, Schenectady and Troy, New York. Tri-Cities Telephone Co., Inc. (Tri-Cities or Tri-City)[1] provides two-way

[1] Although plaintiffs' brief refers to Tri-Cities in the plural, many of the prior administrative and judicial opinions use the name Tri-City. We refer to plaintiff as Tri-Cities except where the singular form is necessary to remain consistent with prior decisions.

marine mobile radio services on the Hudson and Mohawk Rivers and Lake George, New York. Capital District Answering Service, Inc. (Capital District) offers telephone answering services in the Albany region. Plaintiffs Capital, Bakal and Tri-Cities are subject to the jurisdiction of the Federal Communications Commission (FCC) and the Public Service Commission of the State of New York (PSC). *See* 47 U.S.C. § 151 *et seq.*; N. Y. Pub. Serv. Law §§ 90-101-a Capital District is unregulated. All four plaintiff companies are owned and operated by Peter A. Bakal.

Defendant New York Telephone Company (N.Y. Tel.) is a corporation organized under the laws of the State of New York. As a "telephone corporation," N.Y. Pub. Serv. Law § 2(17), N.Y. Tel. is regulated by the PSC, N.Y. Pub. Serv. Law § 94.2, as well as by the FCC, 47 U.S.C. §§ 201-24.

The history of this conflict is a long one. Throughout a variety of administrative and judicial actions, detailed below, plaintiffs have charged that N.Y. Tel. has discriminated against them by performing a number of anticompetitive acts. Among plaintiffs' specific allegations are that they are charged for incoming and outgoing circuits and for circuit installations while their competitors are not; that plaintiffs are charged for radio tie lines, paging numbers and mobile numbers while their competitors are not; that their competitors receive free outpulsing and phone book listings while plaintiffs must pay; and that plaintiffs have no toll call investigation or credit card services while their competitors do receive these services. Ex. D, Plaintiffs' Partial Responses to Defendant's First Set of Interrogatories, J. App. at 154.

B. *Prior proceedings*

Capital and Bakal were granted certificates of public convenience by the PSC in 1962 and 1963 respectively. The record indicates that the administrative and judicial action concerning the dispute between the RCCs and N.Y. Tel. began in 1968 and has continued through the intervening years. The details of these actions are set out in the margin.[2]

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[2] Capital first filed a complaint with the PSC in late 1968, alleging that the tariff filed by N.Y. Tel. contained a charge against the mobile companies. Capital believed that it was being charged for costs for which its subscribers should have been billed directly. *In re Capital Mobile Radio Service, Inc.*, 80 Pub. Util. Rep. 3d (PUR) 445, 449 (Aug. 20, 1969). The PSC disagreed, finding that the fees were charged against the subscribers rather than against the carrier. The PSC also refused to grant Capital's request that it be allowed to bill N.Y. Tel. for calls originating from landline companies and received at mobile units. *Id.* at 452-53.

Tri-Cities filed a complaint with the FCC in 1969 requesting that N.Y. Tel. be required to interconnect with it on the same terms as it did with Tri-Cities' competitors. *In re Petition of Tri-City Telephone Company*, FCC No. 18741 (Recommended decision Nov. 17, 1972), J. App. at 285. The FCC denied the complaint, finding that Tri-Cities' operation at the time did not merit the establishment of a central office like those of its competitors. J. App. at 296. The FCC also rejected Tri-Cities' request that N.Y. Tel. divide revenues with it on the same basis as with Pattersonville Telephone Co., a landline company. The FCC noted that the costs of a landline company's mobile operations are not considered when revenue divisions are calculated, so that the calculations are not comparable. J. App. at 297.

Capital filed another complaint with the PSC in 1970, requesting that its arrangements with N.Y. Tel. be revised. Hearings were held for six days between 1970 and 1972. The PSC found that the evidence did not support Capital's claims of discrimination and anticompetitive action. *Pub. Serv. Comm'n Op.* No. 73-8 (Mar. 12, 1973), J. App. at 212, 229. The PSC ordered N.Y. Tel. to continue to offer direct dial interconnection services to RCCs, but ordered Capital to pay for the services it had received. Stating that the relationship between RCCs and N.Y. Tel. was different than that between landline companies and the telephone company,

[Footnote continued on following page]

Appendix A—Decision of the United States Court of Appeals for the Second Circuit.

In July 1982, after the FCC dismissed their complaint, the RCCs filed this action with the district court. Plaintiffs alleged that the activities on which their prior complaints had been based constitute violations of Sec-

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[Footnote continued from previous page]

the PSC found that the record disclosed no evidence of discrimination by N.Y. Tel. *Id.* at 231-32.

Pursuant to a recommendation by the PSC in the 1973 action, Tri-Cities filed a petition for a certificate of public convenience and necessity. The PSC granted the certificate but rejected the toll revenue division plan offered by Tri-Cities because the marine service provided by Tri-Cities was not similar enough to landline service to allow toll division based on the standard formula. *Pub. Serv. Comm'n Op.* No. 74-21 (July 1, 1974), J. App. at 266-67.

Next, Tri-Cities filed suit in the Appellate Division of the state supreme court requesting that the Commission's decision concerning the interconnection agreement be reversed. *Tri-City Telephone Co.* v. *Alfred E. Kahn*, 49 A.D.2d 126, 373 N.Y.S.2d 655 (1975). Noting that the applicable standard of review was a limited one, the court upheld the PSC's decision. *Id.* at 129.

In May 1978 Capital and Bakal again filed complaints with the PSC. J. App. at 329. These complaints contained allegations of "illegal, preferential and anticompetitive conduct" by N.Y. Tel. favoring plaintiffs' competitor, Pattersonville. *Id.* In a memo the Communications Division informed the PSC that the complaints were without merit. J. App. at 333. The Communications Division believed that the comparison between Bakal's services and those of Pattersonville was not appropriate and that Bakal/Capital were not being treated differently from any other RCC. *Id.* at 334, 336.

Less than a year later, Capital, Bakal and Tri-Cities filed complaints with the FCC. These complaints were substantially similar to the 1978 PSC complaints. J. App. at 325-28. In April 1979 these complaints were dismissed. J. App. at 337.

In February 1980, Capital, Bakal and Tri-Cities unsuccessfully petitioned this Court for an evidentiary hearing in a motion which essentially repeated the allegations of the prior administrative complaints. J. App. at 314. A similar complaint and request for hearing was filed with the FCC in May 1980. In May 1982 the FCC responded. *Capital Telephone Co., Inc.* v. *New York Telephone Co.*, File No. E-80-17 (May 14, 1982). J. App. at 377. The FCC dismissed the complaint as to all allegations except those concerning discrimination in the use of direct distance dialing (DDD). As to those charges, the PSC ordered that access to the DDD network be provided to Capital at the same cost as to N.Y. Tel.'s own mobile service. J. App. at 382.

tions 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and of Section 2 of the Clayton Act, 15 U.S.C. § 13.

C. *District Court Decision*

Defendant moved for judgment on the pleadings under Fed. R. Civ P. 12(c), claiming that its actions are immune from antitrust liability under the state action exemption. After determining that state action immunity is available to private parties, *Capital Telephone Co., Inc.* v. *New York Telephone Co.*, No. 82-CV-789 (N.D.N.Y. Jan. 24, 1984), J. App. at 436, the court applied the facts of this case to the Supreme Court's two part test in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*). Although in *Midcal* the Court considered the threshold question of whether there was a violation of the Sherman Act, *see infra*, the district court did not address this issue below. Because the question was not considered, we will assume for purposes of our analysis that violations of federal antitrust laws are present.

The court determined that New York's Public Service Law and decisions of the state courts demonstrated that the state's "policy . . . articulates and expresses a clear intent to displace unfettered competition with regulated market activity," J. App. at 442, thus satisfying the first part of the test; *see also Midcal*, 445 U.S. at 105. The court also believed that the Public Service Law demonstrated the "active supervision" exercised by the state over telephone corporations. J. App. at 443. Therefore, the court concluded that both requirements for state action immunity had been fulfilled. J. App. at 442-43. Because the court found the state action immunity issue dispositive, it did not consider N.Y. Tel.'s additional

claims of defenses under theories of implied immunity, primary jurisdiction and the filed tariff doctrine. The court granted the defendant's Fed. R. Civ. P. 12(c) motion. *Id.* at 445. Plaintiffs filed Notice of Appeal with this Court on February 14, 1984. J. App. at 447.

Discussion

A. *State Action Immunity*

1. *Development of Standard*

The antitrust laws represent a national policy favoring competition. *Midcal*, 445 U.S. at 110-11. In certain situations that policy is set aside to permit states to exercise control of competition through regulation. Where challenged actions are taken pursuant to a state's legislative determination to displace competition with regulation, a court considering antitrust claims will not interfere with the state's decision. This "state action immunity" from antitrust liability, first recognized in *Olsen* v. *Smith*, 195 U.S. 332, 344-45 (1904), was fully explained by the Supreme Court in *Parker* v. *Brown*, 317 U.S. 341 (1943). In *Parker* the Court held that California's Agricultural Prorate Act did not violate the Sherman Act. *Id.* at 352. The Prorate Act provided for the institution of prorate marketing programs for agricultural commodities in order to "conserve the agricultural wealth of the State" and "prevent economic waste." *Id.* at 346. The program designed for the raisin industry allowed producers to sell only thirty percent of their crops on the open market. Of the remainder, fifty percent was to be placed into a stabilization pool and twenty percent into a surplus pool, both of which were to be marketed by the authorities according to prescribed guidelines. A

producer and packer of raisins sued, claiming *inter alia* that the Prorate Act violated national antitrust laws. The Court disagreed, holding that sovereign acts of states were not within the intended scope of the Sherman Act. *Id.* at 351-52. "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352.

More than thirty years passed before the Court again considered the question of state action immunity. In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Court found that a minimum fee schedule issued by the county bar association and enforced by the Virginia State Bar violated the Sherman Act. Because the state had voluntarily joined in the private anticompetitive activity of the bar association, no immunity applied. *Id.* at 791-92. In *Goldfarb* the Court first used language of compulsion, which has created substantial confusion in succeeding years. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.* at 791.

The following year the Court decided *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Here, too, state action immunity provided no protection. A private utility, subject to regulation by the state public service commission, issued "free" lightbulbs to residential customers. The bulb exchange program, although initiated by the utility, was included in the tariffs filed with the PSC. The existence of the tariff was not enough to immunize the utility from antitrust liability because the light bulb ex-

change program was not essential to the effective functioning of the state's utilities regulation. *Id.* at 598. The Court stated, "[t]here is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Id.* at 596.

The following year in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), state action immunity was held to apply to enforcement by the state supreme court of disciplinary rules against attorney advertising. The Court noted, "we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." *Id.* at 362.

In 1978 the Court upheld the possibility of immunity for acts pursuant to state policy in two cases. In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the Court found that state action immunity would apply to acts of municipalities if those acts were undertaken according to clear state policy. "[T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413 (plurality opinion). *See also New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978). (Act was "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom," *id.* at 109; immunity prevented liability).

In 1980 the Court set out the present controlling standard for determining whether a state agency's in-

volvement in a regulatory scheme was sufficient to render the acts of private parties immune from antitrust liability. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The *Midcal* test incorporated and expanded on ideas expressed in earlier decisions.

California state laws required wine producers and wholesalers to file fair trade contracts and price schedules with the state. The terms of the applicable fair trade contracts and price lists controlled all wholesale transactions. Enforcement procedures were provided, including fines and license suspensions. 445 U.S. at 99-100. Midcal, a wine wholesaler, was charged with selling wine at a price below that set by the fair trade contract. Midcal filed suit in the California courts, claiming that the system was a restraint of trade in violation of the Sherman Act. The state Court of Appeal found a Sherman Act violation and declined to find state action immunity. *Id.* at 100. The United States Supreme Court affirmed.

The Court first considered the "threshold question . . . whether California's plan for wine pricing violates the Sherman Act." *Id.* at 102. The Court found that the system was resale price maintenance, a clear Sherman Act violation. *Id.* at 103.

Once the violation had been established, the Court considered the question of state action immunity. The Court set out the controlling two part test: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Id.* at 105 (quoting *Lafayette*, 435 U.S. at 410 (plurality opinion)).

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The Court determined that California's wine pricing system satisfied the first standard because "[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." 445 U.S. at 105. The program faltered, however, under the second standard. "The State neither establishes prices nor reviews the reasonableness of the price schedules; . . . [t]he State does not monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.* at 105-06. Because no active supervision was found, the Court held that the state's actions were not immune from antitrust liability.

Since its *Midcal* decision the Court has considered the state action immunity issue in two additional cases, with differing results. *See Community Communications Co., Inc.* v. *City of Boulder*, 455 U.S. 40, 55 (1982) (city's anticompetitive actions pursuant to general "home rule" statute were not immune from antitrust liability because there was no clearly established and affirmatively expressed state policy; state was neutral); *Hoover* v. *Ronwin*, 52 U.S.L.W. 4535 (U.S. May 14, 1984) (state supreme court, acting in legislative capacity, developed bar admission testing and operating procedures; *Midcal* test not required because acts in question were those of the sovereign itself rather than of a subdivision; *id.* at 4541 n.33). In neither of these cases has the Court shown any inclination to alter the terms of the *Midcal standard.*[3] Therefore, we apply those standards here.

[3] The plaintiffs argued strenuously that an additional "compulsion" requirement applies, thereby making it necessary to find that the specific acts in question were compelled by the State of New York. The Fifth Circuit has embraced this requirement. *See United States* v. *Southern Motor Carriers Rate Conf., Inc.*, 702 F.2d 532 (5th Cir., Unit B. 1983) (en banc), *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984).

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In the Supreme Court's latest consideration of state action immunity, the Court's language indicates that no compulsion requirement should be read into the standard. *Hoover* v. *Ronwin*, 52 U.S.L.W. 4535, 4538 (U.S. May 14, 1984).

> Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state *authorization*. . . . In such cases, it becomes important to ensure that the anticompetitive conduct of the State's representative was *contemplated* by the State. . . . If the replacing of entirely free competition with some form of regulation or restraint was not *authorized or approved* by the State then the rationale of *Parker* is inapposite.

Id. at 4538 (footnote omitted; emphasis added). This language suggests that the Court does not intend that compulsion be required. The Sixth and Ninth Circuits apparently agree. *See Hybud Equipment Corp.* v. *City of Akron*, 742 F.2d 949 (6th Cir. 1984) (applying two part *Midcal* test; no compulsion requirement included); *United States* v. *Title Ins. Rating Bureau of Ariz., Inc.*, 700 F.2d 1247, 1252-53 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (same). This view is endorsed by antitrust scholars. *See* Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv. L. Rev. 435, 438 (1981) ("Compulsion, however, should not be read as an independent requirement for state action immunity; rather, its presence or absence should serve only as strong evidence about state intent."); Handler, *Antitrust-1978*, 78 Colum. L. Rev. 1363, 1384 (1978) (courts' use of compulsion as a requirement is "overreaction"); Morgan, *Antitrust and State Regulation: Standards of Immunity After* Midcal, 35 Ark. L. Rev. 453, 467-68 (1981) (compulsion was not included in the Court's statement of the standards but "it is likely to remain as a factor, presumably under the first standard").

Contrary to appellants' assertion, this Circuit has never expressly adopted the compulsion requirement. *See Litton Systems, Inc.* v. *AT & T*, 487 F. Supp. 942 (S.D.N.Y. 1980), *aff'd on other grounds*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3534 (U.S. Jan. 17, 1984) (district court discussed compulsion, but based decision on alternative grounds as well; this Court never reached issue); *New York State Electric & Gas Corp.* v. *F.E.R.C.*, 638 F.2d 388 (2d Cir. 1980), *cert. denied sub nom. Village of Penn Yan* v. *New York State Electric & Gas Corp.*, 454 U.S. 821 (1981) (applying *Midcal* test, Court finds insufficient evidence of state policy; in dictum refers to *Goldfarb's* compulsion requirement as evidence of level of involvement which would be necessary). In fact, our most recent consideration of the question adheres to the two part test. *See Battipaglia* v. *New York State*

[Footnote continued on following page]

2. *Application of* Midcal *Standard*

a. *State Policy*

The district court found that it was New York State's policy to displace competition with regulation. Although the court found no specific language clearly stating this intent, it noted statutory provisions, state court decisions and recent legislative activity which supported its view. J. App. at 437-41.

Pervasive regulation alone is not adequate evidence of a state's policy to displace competition. *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1056 (9th Cir.), *cert. denied*, 52 U.S.L.W. 3265 (U.S. Oct. 3, 1983). *Phonetele, Inc.* v. *AT & T*, 664 F.2d 716, 729 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983); *cf. Cantor*, 428 U.S. at 596-97. *See also* Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv. L. Rev. 435, 438 (1981) (not only state supervision is required; "the state must also intend to displace the antitrust laws"). As the district court noted, establishing the existence of such a policy is made more difficult by the legislature's failure to state clearly its intent to control the field. J. App. at 437. However, the district court correctly found that such intent can be gleaned from an examination of the broad regulatory scheme, state judicial decisions and recent legislative action.

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Liquor Auth., slip op. 6417, 6437 (2d Cir. Sept. 21, 1984) (evaluating state action immunity as alternative holding of district court, but declining to rule on it; citing two part *Midcal* test as applicable standard).

In line with our past decisions, our analysis proceeds according to the two part *Midcal* standard.

The New York legislature granted the PSC wide ranging authority over telephone corporations.[4] *See* N.Y. Pub. Serv. Law §§ 90-101-a. The statutory scheme encompasses virtually all aspects of the telephone business: the provision of services by telephone corporations, § 91; rates, §§ 92, 97; "general supervision" by the PSC of corporations and lines, § 94; filing of annual reports, § 95; ordering of repairs, improvements or changes,§ 98; granting of franchises, § 99; transactions in stock §§ 100-01; and reorganization of corporations, § 101-a.

Moreover, the PSC is charged with conducting its activities in the public interest. *State ex rel. Delaware & Hudson Co.* v. *Stevens*, 197 N.Y. 1, 9, 90 N.E. 60 (1909); *State ex rel. New York Tel. Co.* v. *Public Service Comm'n*, 157 A.D. 156, 163, 141 N.Y.S. 1018, 1023 (1913) *See also* N.Y. Pub. Serv. Law § 97.1 (commission shall determine "just and reasonable rates;" if commission finds "that the public interest requires a change in the rate, . . . the commission may . . . authorize an immediate, reasonable, temporary increase or decrease in such rate"); § 97.2 ("the commission shall determine the just, reasonable, adequate, efficient and proper regulations"); § 98 (commission may order repairs, improvements or changes if it belives they ought to be made "in order to promote the convenience of the public"); § 100 ("No consent shall be given by the [PSC] to the acquisition of any stock in accordance with this section unless it shall

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[4] There is no question that this regulatory scheme applies to RCCs such as appellants herein. New York's courts have held that the regulation of RCCs is within the jurisdiction of the PSC. *See Application of Radio Common Carriers of New York, Inc.* v. *Public Serv. Comm'n*, 79 Misc. 2d 600, 360 N.Y.S.2d 552 (Special Term, 1974), *aff'd*, 48 A.D.2d 756, 368 N.Y.S.2d 341 (1975); *In re Digital Paging Systems, Inc.* v. *Pub. Serv. Comm'n*, 46 A.D. 2d 92, 360 N.Y.S.2d 931 (1974).

have been shown that such acquisition is in the public interest."). This legislative charge is another indication of the state's intention to supplant the antitrust laws, also designed to protect the public interest, with a regulatory scheme.

Both the terms of the statute itself and recent action of the state legislature suggest that the regulatory scheme encompasses the same goals as those underlying the antitrust laws. The Public Service Law prevents any telephone corporation from giving "any undue or unreasonable preference or advantage to any person, corporation or locality." § 91.3. Rate schedules must state "all privileges . . . granted or allowed." § 92.1. Corporations are not permitted to extend any contract privileges unless they do so uniformly with respect to all who are in similar situations. § 92.2. The PSC may determine that a telephone company's rates "are unjustly discriminatory or unduly preferential." § 97.1. *See also* §§ 97.2, 100. These standards, against which the PSC is to measure the conduct of telephone corporations, suggest that the statute has as a basis the fundamental principles of antitrust law. If the Public Service Law were not intended to allow for a grant of state action immunity for actions taken pursuant to its provisions, there would be no need for the antitrust principles to appear in the text of the statute.

Recent legislative activity also confirms our belief that the district court interpreted New York State regulatory policy correctly. In 1981 the legislature suspended application of the provisions of Article 5 of the Public Service Law to telegraph corporations. The legislature stated:

> "[We] find[] that since competition exists in communication by telegraph the panoply of regulation

> required by the public service law does not appear to be necessary to assure adequate service at reasonable rates. . . . The legislature therefore declares that it shall be the purpose of this act to suspend regulation of communication by telegraph and to authorize the commission to reinstitute such regulation if, and to the extent, it determines it necessary to protect the public interest."

Legislative Findings and Declaration of Purpose, N.Y.L. 1981, c. 414, § 1.

In an Executive Memorandum accompanying the Act, Governor Carey stated:

> In view of the competition, the extensive regulation which the Public Service Law requires to protect the consumer against monopoly practices in the telegraph industry no longer is necessary. . . .
>
> . . .
>
> This bill, which applies solely to telegraph corporations, will stimulate competition and accelerate the development of innovative communication technologies for the benefit of the residents of New York State.

Memorandum filed with Senate Bill No. 5463. Attorney General Robert Abrams expressed his view in a memorandum for the Governor:

> The Governor's Office has unequivocally assured my office that it was not the intent of this Act, to suspend application of Article 5 of the Public Service Law to any telecommunication service provided by a telephone company such as New York Telephone, the dominant supplier of telecommunications in this State. This assurance is critical.

Attorney General's Memorandum for the Governor Re Senate 5463 (July 2, 1981).

It is clear that both the executive and legislative branches of state government viewed regulation of telegraph corporations as unnecessary. We may assume that had the legislature determined that regulation was similarly unnecessary for telephone corporations it would have suspended application of the statute to those utilities for a similar test period. The fact that the legislature failed to do so leads inescapably to the conclusion that it viewed continued regulation of the telephone industry as necessary to displace competition in the public interest. *See Capital Telephone Co.* v. *City of Schenectady*, 560 F. Supp. 207, 210 n.6 (N.D.N.Y. 1983).

Although it might be appropriate for RTUs to function in an openly competitive marketplace, that decision rests with the legislature. Presently the statutes demonstrate the state's policy to displace competition with regulation.

Appellants argue, however, that, because the particular activities of which they complain are not directed by the legislature through the Public Service Law, there is no basis for a finding of an "affirmatively expressed state policy." This may be another way of saying that a compulsion requirement, which we have already rejected, should be read into the *Midcal* standard. *See supra* note 3. However, because it may be possible for specific activities to be addressed by the statute without being compelled by it, we will consider this argument separately.

The Supreme Court has never held that a comprehensive, specific legislative mandate is necessary to a finding of immunity from antitrust liability. To the contrary, a

broader interpretation has been suggested. In *Lafayette* Justice Brennan wrote:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree . . . that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature *contemplated the kind of action complained of.*"

435 U.S. at 415 (plurality opinion) (citation omitted; emphasis added).

Although this interpretation did not garner majority support on the Court, we consider it to be consistent with the purpose of state action immunity. We find no persuasive authority to the contrary. Where, as here, there is sufficient evidence that a state intended to supplant open competition with regulation, activities that are reasonably necessary or related to the subject of the legislation should be included within the scope of the immunity. *See Cantor*, 428 U.S. at 596 (light bulb exchange program was not a part of the utility's "natural monopoly power;" no immunity was present). *See also* Areeda, *supra* at 445-46 (citing *Lafayette;* noting that, because statutes are rarely clear in their statements of intent, the policy may be inferred "if the challenged restraint of competition is a necessary or reasonable consequence of engaging in the authorized activity"); Morgan, *Antitrust and State*

Regulation: Standards of Immunity After Midcal, 35 Ark. L. Rev. 453, 464-65 (1981) ("[A]uthority to regulate may be implied in general delegations of authority. Any restraints based on such implied legislative decisions must, however, be basic to the regulatory program's functioning."). Therefore, to the extent that appellants' claim of a need for specificity is separable from the compulsion argument, we find it similarly unpersuasive.

In a recent decision the Sixth Circuit reached a similar conclusion. *Hybud Equipment Corp.* v. *City of Akron*, 742 F.2d 949 (6th Cir. 1984). In evaluating the applicability of state action immunity to a waste disposal scheme, the court examined the anticompetitive restraint in light of the legislative intent. "If the challenged restraints are reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation, they can be found to result from a 'clearly and affirmatively expressed state policy' to displace competition." *Id.* at 960-61. The court held that although the waste regulation statute itself was not an adequate basis for a finding of immunity, when combined with provisions allowing contractual arrangements for carrying out state policy it was sufficient evidence of a "reasonable relationship." *Id.* at 961-62. Therefore, the first *Midcal* requirement was satisfied. The evidence in the instant case is at least as strong; here too there is a "reasonable relationship" between the restraints in question and the state policy.

B. *Active Supervision*

The district court found that the state legislature had "expressly conferred" powers upon the PSC which enabled it to review rates and other aspects of telephone

company operations for reasonableness. J. App. at 442. Because the program requires "active state involvement in the operative anticompetitive decisions," the court found the state's supervision adequate to warrant a finding of immunity. *Id.* (citing P. Areeda, *Antitrust Law* ¶ 212.7 (Supp. 1982) at 71). Although we find the question to be a close one, we conclude that the district court's determination was correct. The Public Service Law provides for comprehensive, ongoing involvement by the state in the functioning of telephone corporations. This involvement is sufficient to meet the second *Midcal* requirement.

The regulatory scheme gives the PSC a broad range of powers: "The commission shall have general supervision of all . . . telephone corporations and . . . telephone lines within its jurisdiction . . . ." N.Y. Pub. Serv. Law § 94.2. Within the ambit of "general supervision" fall such activities as examination of "all books, contracts, records, documents and papers," § 94.3; and investigation of "any act done or omitted to be done," § 96.1.[5] Procedures for the development and enforcement of rates are extensively covered by the statute. *See* N.Y. Pub. Serv. Law § 92 (orders filing of rate schedules, provides for PSC hearings where changes in rate schedules are sought); § 97 (PSC may hold hearing on rates either on receipt of complaint or on own motion; PSC shall determine reasonable rates and may authorize temporary rate

[5] The PSC also has authority to inspect "property, equipment, buildings, plants, factories, offices, apparatus, machines, devices and lines," § 94.2, and to develop accounting systems, § 95.2. In addition, the PSC must provide for management and operations audits at least once every five years, § 96.6, and may order repairs and improvements in equipment or facilities, § 98; approve the lease, assignment or sale of a franchise, § 99.2; and allow telephone corporations to acquire or purchase stock in other similar entities, § 101.

changes). Moreover, any telephone corporation wishing to "issue stock, bonds, notes or other evidence of indebtedness . . . when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service within the state . . ." must receive authorization from the commission. § 101.

It is clear that the legislature intended the PSC's authority over telephone corporations to be very broad. This regulatory role is quite different from that of the State of California in *Midcal.* There, the Supreme Court found that no immunity was possible for the wine pricing program because the state's involvement did not constitute "active supervision." *Midcal,* 445 U.S. at 105-06. "The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.*

Here, by contrast, the state has authority to review any contracts entered into by the telephone corporations, § 94.3, to examine "accounts, records and memoranda," § 95.2, and to "investigate . . . any act done or omitted to be done by any . . . telephone corporation." § 96.1. This role provides much more than a "gauzy cloak of state involvement [cast] over . . . a private price-fixing agreement." *Midcal,* 445 U.S. at 106. It would be inconsistent with such a broad regulatory scheme to find that the particular activities in question are subject to antitrust liabilities where the legislature so clearly intended to allow the PSC to control all activities which are a reasonable part of such a regulatory scheme. Therefore, we agree with the district court that this regulatory

program constitutes "active supervision" under *Midcal.*[6] *See Capital Telephone Co.* v. *City of Schenectady,* 560 F. Supp. at 210-11 (comprehensive regulatory scheme satisfies "active supervision" requirement, state action immunity protects city from liability for denial of franchise to Capital); *North* v. *New York Telephone Co.*, 1980-81 Trade Cas. ¶ 63,675 (S.D.N.Y. 1980) (rate structure of N.Y. Tel. is immune from antitrust liability; all aspects of rate structure are regulated and state "actively investigates, supervises and determines NYT's rates." *Id.* at 77,628).

3. *Additional Arguments*

In an attempt to find controlling precedent in other telecommunications cases, appellants make two additional arguments. First, they insist that we should follow cases which have failed to find state action immunity in regula-

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[6] The dissent misinterprets our analysis to hold that regulations that satisfy the second prong of the *Midcal* test must necessarily satisfy the first. Our analysis of the "state policy" prong incorporates evidence of legislative intent found in both the scheme itself and in recent legislative activity.

Where the regulatory scheme demonstrates that the state actively supervises the telephone industry, we need not look to wholly different sources to find support for first prong analysis. Where no clear expression of state policy exists, we may look to the breadth of the regulatory scheme, as a demonstration of the legislature's delegation of authority, in conducting our first prong *Midcal* analysis. *Hybud Equipment Corp.* v. *City of Akron,* 742 F.2d 949, 960 (6th Cir. 1984) ("a legislative intent to displace competition may be inferred from the legislature's delegation of authority"). Our use of this particular regulatory scheme in evaluating both prongs of the *Midcal* test in no way suggests that satisfaction of one prong requires satisfaction of the other.

The dissent also fails to credit our use of other evidence to support our finding, specifically, the legislature's recent action concerning the telegraph industry. While regulation alone is not enough to provide exemption from the antitrust laws, here there is more than mere regulation.

tory schemes which are primarily interstate in character. In short, they contend that the doctrine of state action immunity does not apply to the telecommunications industry, *citing United States* v. *AT & T*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd mem.*, 51 U.S.L.W. 3632 (U.S. Feb. 28, 1983), and that, even if it did, telecommunications regulations rarely meet the strict *Midcal* standards, *citing Northeastern Tel. Co.* v. *AT & T*, 497 F.Supp. 230 (D. Conn. 1980), *rev'd in part, vac. in part & remanded*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); and *Essential Communications Systems, Inc.* v. *AT & T*, 610 F.2d 1114 (3d Cir. 1979). Quoting liberally from *United States* v. *AT & T*, appellants argue that because N.Y. Tel.'s operations are closely tied to interstate commerce, no claim of state action immunity is possible.

These cases are clearly distinguishable, both on their facts and because appellants erroneously characterize the applicable standard as one of "exemption." It is true that the *AT & T* Court found that because Congress had extensively regulated the telecommunications industry, the area was one which is "national par excellence." 552 F. Supp. at 157-58. However, the court also noted that much of the conduct involved was not the subject of state regulation at all, while the remainder was subject only to tariffs. *Id.* at 158. The instant action is quite different because the activities are subject to comprehensive state regulation and there is no conflict here with federal legislative policy. *See also Essential*, 610 F.2d at 1125 (state law not clearly involved in the regulation in question; no exemption found in the 1934 Communications Act); and *Northeastern*, 651 F.2d at 82-84 & n.7 (FCC regulation does not prevent liability for protective coupler requirement).

Appellants' characterization of the standard as "exemption" adds to the confusion. The standard which should be applied is that of preemption. *See* Handler, *Antitrust-1978*, 78 Colum. L. Rev. 1363, 1378-83 (1978) (explaining difference between exemption and preemption and noting that the presumptions that apply are different in the two situations). Because there is substantial state regulation of the activities in question here, in contrast to those involved in *AT & T*, the question should be whether Congress has *preempted* the field of telecommunications regulations. It is clear that Congress has not exclusively occupied this area; the extensive regulatory schemes in virtually every state demonstrate the viability of state interest in the field. In addition, there is no basis for a finding that there is an intolerable conflict between federal and state interests. Therefore, there is no preemption present here. In the absence of evidence of intent to preempt, a holding that a state may not circumvent the antitrust laws through its own regulatory scheme would challenge the federalism on which our governmental system is based.

Appellants' second argument is that any state action present here is not adequate to confer immunity on the defendants, *citing Litton Systems, Inc.* v. *AT & T*, 487 F. Supp. 942, 959 (S.D.N.Y. 1980), *aff'd on other grounds*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3534 (U.S. Jan. 16, 1984) (district court found no state action immunity, holding that, as in *Cantor*, the program in question was initiated by the utility rather than by the state, which only approved tariffs; court of appeals affirmed on different grounds without reaching state action); *Phonetele, Inc.* v. *AT & T*, 664 F.2d 716, 735-36 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983) (filing of tariff alone is not adequate to confer state action im-

munity); and *Sound, Inc.* v. *AT & T*, 631 F.2d 1324, 1334-35 (8th Cir. 1980) (no evidence of state policy requiring displacement of competition by regulation).

This argument also must fail. As we stated above, New York's current policy clearly favors the imposition of regulatory controls over competition in the telephone industry.[7] Moreover, the legislature has given the PSC a considerably more active role than the mere approval of tariffs. Therefore, the district court was clearly correct in concluding that on the facts of this case N.Y. Tel. is protected from federal antitrust liability by state action immunity.

The judgment of the district court is affirmed.

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[7] We note that New York's courts have interpreted the application of state antitrust laws to the Public Service law differently. *See Capital Telephone Co.* v. *Pattersonville Telephone Co.*, 56 N.Y.2d 11, 18, 451 N.Y.S.2d 11, 14 (1982). Although proper application of the state action immunity doctrine should include consideration of state judicial decisions, we believe that a federal court may reexamine the issue precisely because the doctrine is based on the principles of federalism.

We disagree with the dissent in its belief that *Pattersonville* mandates a different result. We read that case to hold only that a "not illegal" ruling by the PSC does not collaterally estop the plaintiff from filing suit under the state antitrust laws. *See Columbia Gas* v. *New York State Electric and Gas Corp.*, 28 N.Y. 2d 117, 128-29, 320 N.Y.S. 2d 57, 66 (1971) (holding that failure to assert per se antitrust violation does not prevent fact-based, rule of reason analysis of antitrust allegations). We do not agree that the *Pattersonville* Court's decision in this limited context provides incontrovertible evidence of an affirmative state policy. In the absence of a clear statement of legislative intent, we cannot view this decision as more powerful than the recent legislative action deregulating the telegraph industry, but retaining regulatory authority over the telephone industry. The legislature has not taken advantage of the opportunity to repeal the application of L. 1981, c. 414, § 2; nor has it expanded the 1981 act to include the telephone industry. New York's legislature of course remains free to bring the actions of the state telephone industry within the scope of federal antitrust laws.

PIERCE, *Circuit Judge, dissenting:*

I dissent. I cannot agree with the majority's conclusion that appellee's allegedly anticompetitive activities are protected from federal antitrust scrutiny by state action immunity. I do not believe that New York, by choosing to regulate the telephone industry, has acted to displace competition therein. Hence, I would hold that state action immunity is not available to appellee under the standards set forth by the Supreme Court in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

The state statute upon which the majority relies in finding the alleged anticompetitive conduct protected requires only that telephone companies shall provide "adequate service" at "just and reasonable charges" without "unjust discrimination" or "unreasonable preference" and that the Public Service Commission ("PSC") shall have powers of "general supervision" over such companies. N.Y. Pub. Serv. Law §§ 91, 94 (McKinney 1955). This vague mandate cannot satisfy the requirement of *Midcal* that anticompetitive conduct, to be exempt, must be "*clearly articulated and affirmatively expressed* as state policy." *Midcal*, 445 U.S. at 105 (emphasis added).

Moreover, in *Capital Telephone Company* v. *Pattersonville Telephone Company*, 56 N.Y.2d 11 (1982), the New York Court of Appeals explicitly held that the state Public Service Commission's approval of a practice challenged as anticompetitive will not preclude a private plaintiff's state antitrust action attacking that practice. In so deciding, the New York Court of Appeals necessarily concluded that the State's decision to regulate the telephone industry is not inconsistent with the principles of

competition. Under these circumstances, the conduct challenged here cannot reflect an affirmative state policy and hence is not exempt from federal antitrust scrutiny. *See Midcal*, 445 U.S. at 105.

State action immunity is based principally on considerations of federalism. It allows states a limited degree of autonomy and latitude in pursuing independent economic policies.[1] States may make choices concerning economic regulation even though those choices might otherwise violate the Sherman Act. However, the Sherman Act is fundamental national economic policy. *See Midcal*, 445 U.S. at 106. Consequently, not every instance of state economic regulation gives rise to exemption from federal antitrust law: "The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 596 (1976). Nor will every choice of a state that conflicts with the policies of the Sherman Act be respected: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." *Parker* v. *Brown*, 317 U.S. 341, 351 (1943) (quoted in *Midcal*, 445 U.S. at 106). Thus, a state is at times free to supplant the Sherman Act's policy of free competition with one of actively regulated monopoly or

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[1] There may be limits other than those expressed in *Midcal* on a state's ability to impose a regime of economic regulation that conflicts with the principle of free competition mandated by the Sherman Act. For example, Judge Greene, in *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 157-58 (D. D.C. 1982), *aff'd*, 103 S. Ct. 1240 (1983), suggested that state action immunity may be unavailable where the industry involved is by its nature "technologically and economically, a national network with interdependent components"—such as the telephone industry.

oligopoly—but it may not defeat the Sherman Act without adopting a coherent policy toward anticompetitive activities and subjecting that policy to "pointed re-examination by the policymaker." *Midcal*, 445 U.S. at 105-06; *see Bates* v. *State Bar of Arizona*, 433 U.S. 350, 362 (1977).

The Supreme Court, in *Midcal*, established "two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised by the State itself.'" *Midcal*, 445 U.S. at 105 (quoting in part *City of Lafayette* v. *Louisiana Power & Light*, 435 U.S. 389, 410 (1978) (plurality opinion)). These are *independent* requirements, and *each* must be fulfilled if a challenged restraint is to be considered exempt from federal antitrust scrutiny. The purpose of the two-pronged *Midcal* test is to insure both that the State makes a conscious choice to displace competition and that this choice is subject to critical re-examination. If both these ends are to be accomplished, it may not be assumed that the requirements are met whenever the State engages in economic regulation. Rather, as perusal of *Lafayette*, *Cantor*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and other decisions leading up to *Midcal* reveals, the test is to be applied strictly. In my opinion, the majority fails to make the proper strict application of the *Midcal* test to the facts of this case.

The majority holds that regulation of the telephone industry by the state Public Service Commission is sufficient to satisfy the "active supervision" prong of the *Midcal* test, and it may be that this conclusion is correct. However, the majority also holds that this same regulation clearly evinces the state legislature's choice to pursue

a policy in conflict with that of the Sherman Act. The problem with this analysis is that it conflates the two requirements of *Midcal* making them one. Under the majority's analysis, regulation that fulfills the "active supervision" requirement of *Midcal* necessarily satisfies its demand that the challenged restraint be "clearly and affirmatively expressed as state policy." But, as already stated, not every instance of state economic regulation gives rise to exemption from federal antitrust laws. The Supreme Court has made clear that regulation alone is *not* sufficient to exempt challenged restraints from antitrust scrutiny.

In *Goldfarb*, 421 U.S. 773, the Court recognized that the State Bar was given power to regulate the legal profession but nevertheless held that its price-fixing activities were not beyond the purview of the Sherman Act: "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id.* at 791. The Court went on to hold that because there was no evidence showing the Bar's price-fixing activities to be within the policy of the *State as sovereign*, those activities were not exempt from antitrust scrutiny. And in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, the Court rejected defendants' argument that because the state Public Utility Commission had approved a tariff containing the allegedly anticompetitive activity—distribution of free lightbulbs—the Sherman Act was inapplicable thereto. The Court reasoned that without a showing of actual conflict between the state regulatory policy and that of the Sherman Act there could be no implied exemption from the antitrust law. The Court found that because the activity challenged in *Cantor* was not compelled by the State, it should not be considered within the State's

affirmative regulatory policy. As the Court stated in words applicable to this case:

> Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition . . . . But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of economy.

Id. at 595-96.

Here, making what I consider to be the proper strict application of the *Midcal* test, I would hold that the activities of appellee, to the extent that they violate the Sherman Act, are not within the "clearly articulated and affirmatively expressed" policy of the State of New York. In finding appellee's allegedly anticompetitive conduct exempt from federal antitrust scrutiny, the majority relies upon the Public Service Commission's approval of that conduct. However, this approval is insufficient evidence that appellee's conduct reflects any *affirmative* policy of the State. I find it far from certain that the PSC decisions at issue here are anything more than determinations that the appellant has failed to prove that appellee's conduct violates the New York Public Service Law. Moreover, even if the Public Service Commission has mandated New York Telephone's actions, this is nevertheless insufficient

to constitute a statement of policy of the *State*. The Public Service Commission is not the State itself. Therefore, before concluding that its actions have immunized a private defendant from antitrust liability, a court must ascertain whether the state "legislature [in granting the Public Service Commission power to regulate New York Telephone] contemplated the kind of action complained of." *Community Communications Co.* v. *Boulder*, 455 U.S. 40, 55 (1982). As already noted, New York's Public Service Law provides only that telephone companies shall give "adequate service" at "just and reasonable charges" without "unjust discrimination" or "unreasonable preference" and that the PSC shall have powers of "general supervision" over such companies. N.Y. Pub. Serv. Law §§ 91, 94. This vague grant of power evidences, at best, the legislature's neutrality toward Public Service Commission approval of anticompetitive conduct. "[P]lainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting the . . . actions challenged as anticompetitive." *Community Communications*, 455 U.S. at 55.

Moreover, to the extent that New York Telephone's conduct might actually violate the Sherman Act, that conduct would appear to directly conflict with New York State's regulatory policy. This conclusion follows from two facts. First, as all parties concede, the Public Service Commission seeks to promote competition in *all* aspects of the telephone industry. *See* Testimony of Paul Gioia, Chairman, Public Service Commission of the State of New York, before Legislative Commission on Science and Technology and Assembly Committee on Corporations, Authorities, and Commissions, February 1982. Thus, to the extent that the Public Service Commission has ap-

proved practices challenged herein, that decision logically would represent at most a determination that such practices are not anticompetitive. It would not imply that the PSC considers a certain level of anticompetitive behavior desirable. Second, and more importantly, the New York Court of Appeals has ruled—in a case involving the parties herein—that a Public Service Commission determination as to the legality of various practices will not bar a private plaintiff from pursuing a state antitrust action challenging those practices. *Capital Telephone Company* v. *Pattersonville Telephone Company, et al.*, 56 N.Y.2d 11 (1982). In that case, the N.Y. Court of Appeals stated that "discrimination which may be justifiable under . . . the Public Service Law 'may still be unlawful if it can be shown to have actually restrained competition.'" *Id.* at 19. Since New York's Donnelly Act, N.Y. Gen. Bus. Law § 340 (McKinney 1968), is essentially a state version of the Sherman Act—and hence there is no evidence herein that New York State intended to displace its own, let alone federal, antitrust laws—the State's decision to regulate the telephone industry cannot be considered inconsistent with application of federal antitrust law to that industry. Thus, one must conclude that New York's antitrust law and Public Service Law fulfill different but complementary functions with regard to the telephone industry, and, further, that Public Service Commission regulation does not conflict with a policy of free competition in the telephone industry.[2]

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[2] As a general proposition, the interpretation of a state's law by the highest court of that state is conclusive. *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 211 (1960); *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 337 (1944); *Sutter Butte Canal Co.* v. *Railroad Commission*, 279 U.S. 125, 139 (1929). This rule, of course, is inapplicable when acceptance of such an interpretation would thwart vindication of a constitutional right, *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938), but such a situation is not present here.

For the foregoing reasons, I would conclude that New York has not decided to eliminate competition in the telephone industry but instead has decided to encourage competition through the dual means of careful regulation and application of antitrust law, state and federal. Under these circumstances, I would hold that appellee's allegedly anticompetitive activities are not exempt from the federal antitrust laws. *See Cantor* v. *Detroit Edison Co.*, 428 U.S. at 595-96. I would reverse and remand accordingly.

APPENDIX B1

Memorandum Decision and Order of the United States District Court for the Northern District of New York

UNITED STATES DISTRICT COURT
Northern District of New York

82-CV-789

CAPITAL TELEPHONE COMPANY, INC., PETER A. BAKAL, TRI-CITIES TELEPHONE COMPANY, INC., and CAPITAL DISTRICT ANSWERING SERVICE, INC.,

Plaintiffs,

-against-

NEW YORK TELEPHONE COMPANY,

Defendant.

Appearances:

ROLAND & FOGEL
Attorneys for Plaintiffs
1 Columbia Place
Albany, New York 12207

OF COUNSEL:

Keith J. Roland
Emilio A. F. Petroccione

WALTER C. REID
RAYMOND F. BURKE
Attorneys for Defendant
1095 Avenue of the Americas
New York, New York 10036

Walter C. Reid
Raymond F. Burke
N. Michael Grove

Appendix B1—Memorandum Decision and Order of the United States District Court for the Northern District of New York.

CASEY, YANAS, MITCHELL
& AMERLING
Local Counsel for Defendants
100 State Street
Albany, New York 12207

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION and ORDER

This action is brought pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 2 of the Clayton Act, 15 U.S.C. §13, for the defendant's alleged violations of such federal antitrust laws. Collectively, the four plaintiffs seek substantial compensatory and punitive money damages and injunctive relief. Presently, before this court is defendant's motion, on four stated grounds under Fed.R.Civ.P. 12(c), for judgment on the pleadings.

FACTS and BACKGROUND

Plaintiff Peter A. Bakal, (Bakal), is an individual doing business in the city of Schenectady, New York. He, in his personal named business, provides one-way paging, two-way mobile, and air-to-ground radio telephone service. Plaintiff Capital Telephone Company, Inc., (Capital), a New York corporation, offers the same type one-way paging and two-way mobile telephone service. Plaintiff Tri-Cities Telephone Company, Inc., (Tri-Cities), a New York corporation, offers marine mobile radio telephone service. Plaintiff Capital District Answering Service, Inc., (Answering Service), a New York

corporation, provides telephone answering services. Bakal, Capital and Tri-Cities are all radio common carriers, (RCC).

All plaintiffs allege that their services are provided both within and without New York State. Furthermore, they allege that they are all interconnected to both interstate and intrastate telephone lines of the defendant New York Telephone Company, (New York Tel), and rely upon such lines and facilities in order to conduct their businesses. Plaintiffs Bakal, Capital and Tri-Cities are "telephone companies" subject to the jurisdiction and regulation of the Federal Communications Commission, (FCC), and the New York State Public Service Commission, (PSC). *See* N.Y. PUBLIC SERVICE LAW §§2(17), 5(1)(d) and 94(2) (McKinney 1955, West Supp. 1983-84) (N.Y. Pub. Serv. L.); *see also Capital Telephone Company, Inc. v. Kahn,* 81 Misc.2d 444 (1975), 52 A.D.2d 650 (3rd Dept. 1976). It should be noted that plaintiff Peter A. Bakal is the President and sole Director of the three corporate plaintiffs. (Defendant's Memorandum, p. 3).

The defendant New York Tel, is a New York telephone corporation providing mostly land line telephone services and some radio telephone services to subscribers. *See* N.Y. Pub. Serv. L. §2(17). As such it is subject to the jurisdiction and regulation of the FCC and PSC. *See* N.Y. Pub. Serv. L. §§5(1)(d) and 94(2).

The complaint alleges generally that the defendant, in its dealings with the plaintiffs, has acted in a discriminatory manner toward them through its business practices and relations with other telephone companies,

and in its own operations. In addition, plaintiffs allege that the defendant has conspired with other unnamed telephone companies so as to impede competition in the RCC market, thus hindering the plaintiffs' abilities to compete profitably within this sector of the telecommunications industry. The thrust of the plaintiffs' contentions is that through a conspiracy and discriminatory business practices, the defendant has failed to provide adequate and reasonable monopoly telephone service in the following ways: (1) that defendant has conferred a monetary benefit upon plaintiffs' competitors, but not upon plaintiffs; (2) that defendant has charged anticompetitive rates to plaintiffs; (3) that defendant fails to provide plaintiffs with various services on the same terms and conditions upon which such services are provided to plaintiffs' competitors, or to itself; (4) that defendant provides inadequate services to plaintiffs and refuses to correct deficiencies upon plaintiffs' request; (5) that defendant has used and abused its monopoly power to confer upon itself and plaintiffs' competitors beneficial telephone listings and classified listings not made available to plaintiffs and (6) that defendant has refused to refer customers to plaintiffs.

It is important to note here that there has been a long history of disputes between the plaintiffs and defendant. (Defendant's Memorandum, pp. 4-9). These disputes have come before the PSC, FCC, and both state and federal courts. In fact, the plaintiffs, either separately or collectively, have previously presented many of the specific claims contained in the present complaint to these administrative and judicial bodies. Currently, a

motion for reconsideration on behalf of all the parties is pending before the FCC, many of the complaints to this national regulatory body being the same as those asserted in the present complaint.

The defendant, New York Tel, raises four grounds which it claims warrant a judgment on the pleadings in its favor; they may be described briefly in this manner: (1) "state action" immunity; (2) implied immunity; (3) primary jurisdiction and (4) the filed tariff doctrine. Grounds 1, 2 and 4 are seemingly interrelated. However, it has been urged that the state action immunity doctrine deserves less hostile judicial treatment than implied immunity. Handler, *Antitrust-1978*, 78 Colum. L. Rev. 1363, 1388 (1978). The effect of these doctrines is to protect activity which, in the absence of state involvement, would run afoul of federal antitrust laws. However, for reasons made evident later, not all of these grounds raised by defendant require discussion to support this court's final decision.

DISCUSSION: STATE ACTION IMMUNITY

Parker v. Brown, 317 U.S. 341 (1943) is commonly regarded as the leading case which established the state action immunity doctrine. However, the doctrine's roots extend back to *Olsen v. Smith*, 195 U.S. 332 (1904) and *Lowenstein v. Evans*, 69 F. 908 (C.C.D.S.C. 1895). *See* Handler, *The Current Attack on the "Parker v. Brown" State Action Doctrine*, 76 Colum. L. Rev. 1, 3, n.9 (1976). In *Parker*, the Court immunized a California state agency, acting under the California Agricultural Prorate Act, from antitrust liability under the Sherman Act.

Since 1943, courts have questioned the circumstances which warrant a finding of immunity, and what parties may properly be protected under it. Great care must be exercised when state action immunity under *Parker* is claimed to exist.

Before examining the criteria to be satisfied in order to find such immunity, a critical issue raised by the parties must be addressed, that being, may private parties receive the protection afforded by *Parker*. Lower courts and treatise authors have struggled with this question, for *Parker* only addressed the grant of immunity upon the state and remained silent as to its possible application to private parties. Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term-1977*, 77 Colum. L. Rev. 979, 1005 (1977) (Handler, *Changing Trends*).

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), Justice Stevens, for a plurality of the Court, appeared to state that the *Parker* doctrine was limited to state governments and their subdivisions. However, Chief Justice Burger, concurring in the judgment, did not agree that *Parker v. Brown* can be limited to suits against state agencies and officials. *Cantor*, 428 U.S. at 603-604. As a result, a majority of the Court refused to follow Justice Stevens' proposition that a private party can never be accorded state action immunity under *Parker*. *See* 1 P. Areeda & D. Turner, *Antitrust Law* §212 b at 69 and n.17 (1978) (Areeda & Turner, *Antitrust*). Accordingly, many courts have concluded that under appropriate circumstances private parties may properly receive immunity under *Parker v. Brown*.

Appendix B1—Memorandum Decision and Order of the United States District Court for the Northern District of New York.

California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 824 n.9 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982); *Mobilfone of Northeastern Pennsylvania v. Commonwealth Telephone Co.*, 571 F.2d 141, 144 (3rd Cir. 1978); *see* 1 Areeda & Turner, *Antitrust* ¶212 b at 69 n.17, ¶215 d; Handler, *Twenty-Fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 9, 11 (1972) (Handler, *Twenty-Fourth Annual*); Handler, *Changing Trends, supra* at 1011; Handler, *Antitrust-1978*, 78 Colum. L. Rev. 1363, 1377 (1978). Thus, finding ample support for applying state action immunity to a private party, it is appropriate to address the criteria to be satisfied for a proper finding of immunity.

In *California Liquor Dealers, supra*, 445 U.S. 97, the Supreme Court enunciated the criteria which, when satisfied, warrant a finding of state action immunity under *Parker*. To find such immunity it must be shown that: 1) the challenged conduct or restraint is clearly articulated and affirmatively expressed as state policy and 2) the policy must be actively supervised by the state itself. 445 U.S. at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (footnote omitted). Despite the apparent simplicity of this two tier analysis, its application is often made difficult due to the unique facts of every case.

It is well settled that a state's policy must articulate or express clearly an intent to displace unfettered competition with regulated or monopoly market activity. *California Liquor Dealers*, 445 U.S. at 105 (quoting *New*

Appendix B1—Memorandum Decision and Order of the United States District Court for the Northern District of New York.

Motor Vehicle Board v. Orrin W. Fox, Co., 439 U.S. 96, 109 (1978)); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1977) (opinion of Brennan, J.). However, the cases fail to define with equal clarity the modes by which the States can express this intent so as to accord state action immunity to private parties acting under state policy and supervision. Legislatures rarely state such an intent in the state statutes themselves. *See* P. Areeda, *Antitrust Law*, ¶212.3a (Supp. 1982) (Areeda, *Antitrust*, Supp.). As a result, courts have often pursued a path of inquiry on this point which lies between interpreting a state's statutory language and examining the degree of state supervision and regulation; yet, recognizing that absent express language of intent, a regulatory scheme may inherently displace unrestrained business freedom, *see* Areeda, *Antitrust*, Supp, ¶212.3 at 54 n.9; *see generally New Motor Vehicle Board v. Orrin W. Fox, Co.*, 439 U.S. 96 (1978), or that "[t]he existence of state supervision over anticompetitive behavior may, . . ., indicate the requisite intent as well." 1 Areeda & Turner, *Antitrust* ¶212 c at 71.

New York State's statutory scheme for the regulation of the telecommunications industry does not contain specific language stating an intent to displace competition. (*See generally*, N.Y. Pub. Serv. L., Article V, §§90 *et seq.*). However, it is quite clear that Article V of the Public Service Law contains comprehensive statutory provisions relating to the rates and various business activities of telephone companies, in addition to the powers and control granted to the New York State PSC. Briefly, the statutes cover: (A) rate making

procedures and the rates to be charged, §§91(1), 92; (B) the services that are to be provided and the adequacy thereof, §91(1),(3); (C) contractual relations and all agreements between regulated companies, §92(1); (D) annual reports which must be filed by all regulated companies §95; (E) the liability and sanctions to be imposed for a regulated company's violation of any law to which it is subject or an order of the PSC, §93.

Article V of the Public Service Law confers upon the PSC the authority to: (A) determine rates, §§92(2), 97; (B) investigate a regulated company's business practices, §§92(2), 96(1); (C) conduct an examination of a regulated company's business premises and facilities, §94; (D) examine all contracts entered into among regulated companies, §94; (E) order various business practices, repairs and improvements, §§97, 98 and (F) supervise all aspects of a regulated company's service, and its compliance with the laws of New York State and the directives issued by the PSC itself, §94(2). The exercise of the PSC's powers as outlined above may be initiated upon its own motion, or by the filing of a complaint with the Commission. Moreover, the PSC has the ability to conduct full hearings on any aspect of a regulated telephone company's activity which is subject to its jurisdiction.

New York courts have had much opportunity to construe the intent and scope of the Public Service Law and the role of the PSC. Their holdings make clear that "[t]he Public Service Law was designed and enacted with the paramount purpose of protecting the public." *New York Telephone Co. v. Public Service Commission of New*

York, 36 A.D.2d 261, 270 (3rd Dept.) (citing *People ex rel. Delaware & Hudson Co. v. Stevens*, 197 N.Y. 1 (1909), *motion for stay granted*, 28 N.Y.2d 994, *modified on other grounds*, 29 N.Y.2d 164 (per curiam). Moreover, "[t]he business of rate making has been confided by the legislature to a body of experts" (the PSC) "with powers of inquiry adequate to the task". *New York Telephone Co., supra*, 36 A.D.2d at 268 (citing *City of Rochester v. Rochester Gas & Electric Corp.*, 233 N.Y. 39, 49 (1922) (Cardozo, J.)). And in performing this task, the PSC is ". . . not subservient to the discretion of a utility. . . ." *Matter of General Telephone Co. v. Lundy*, 17 N.Y.2d 373, 379 (1966) (citing *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 346 (1892)); *see Matter of New York Telephone v. Public Service Commission of New York*, 64 A.D.2d 232, 239 (3rd Dept. 1978); *Matter of Tele/Resources v. Public Service Commission of New York*, 58 A.D.2d 406, 410 (3rd Dept. 1977). More important is the fact that the PSC's approval or determination of a regulated utility's rates reflects the state's intent to permit the continuation of monopolistic services. *See generally Matter of Niagara Mohawk Power Corp.*, 59 A.D.2d 73, 74 (3rd Dept. 1977), *motion for leave to appeal denied*, 43 N.Y.2d 646, *cert. denied*, 437 U.S. 901 (1978). Finally, the PSC is well staffed to monitor and regulate a telephone company's business practices and rates to ensure that they are neither discriminatory nor predatory. *Matter of Tele/Resources, Inc., supra*, 58 A.D.2d at 411.

Recently, the New York State Legislature suspended application of various provisions of Article V of the Public Service Law relating to the telegraph industry

upon its finding that adequate competition exists in that market. However, the provisions of Article V which relate to telephone companies were not altered, and remain in full force. *See* N.Y. Pub. Serv. L. §90(2), N.Y.L. 1981, c. 414, section 1. Also, during recent legislative hearings, Paul L. Gioia, in his capacity as Chairman of the PSC, stated that:

> Since the enactment of Article V of the Public Service Law in 1910, the communications industry, quite obviously, has undergone dramatic changes. However, the regulatory requirements and structure contained in Article V of the Public Service Law have remained virtually unchanged over this 70 year period. *The Public Service Law is all encompassing to the extent that it requires regulation of all telephone services provided by telephone companies. . . .*" (emphasis added).

P. Gioia, *Telecommunications Regulation in New York State*, before The Legislative Commission on Science and Technology, and The Assembly Committee on Corporations, Authorities and Commissions, pp. 41-42 (February 24, 1982) (Designated as "APPENDIX A" to Plaintiffs' Memorandum submitted in opposition).

After a close examination of New York's Public Service Law, the New York courts' interpretations of this statutory scheme and the current New York legislative activity in the telecommunications industry, it is clear that rates and business practices of a telephone company are closely and actively regulated and supervised by both state law and the PSC. Despite the absence of express statutory language, the intent to displace competitive market activity may be inferred from both the duties and

the nature of the powers conferred upon a particular government entity. *Princeton Community Phone Book, Inc. v. Bate,* 582 F.2d 706, 717 (3rd Cir. 1978) (citing *Duke & Company, Inc. v. Foerster,* 521 F.2d 1277, 1280 (3rd Cir. 1975)); *see generally New Motor Vehicle Board v. Orrin W. Fox, Co.,* 439 U.S. 96 (1978); *Mobilfone of Northeastern Pennsylvania, Inc. v. Commonwealth Telephone Co.,* 571 F.2d 141, 146 (3rd Cir. 1978); 1 Areeda & Turner, *Antitrust,* ¶212 c, 213 a, 215 b at 95 (discussion in context of "compulsion requirement", yet dispositive effect of state regulation is noted). Moreover, "[t]he state need not contemplate the precise action complained of as long as it contemplated the kind of action to which objection is made." *Princeton, supra,* 582 F.2d at 717. Consequently, it is my finding and conclusion that New York's statutory scheme for regulating the telecommunications industry shows a clear intent to displace competition with regulation. *See generally Capital Telephone Co., Inc. v. City of Schenectady,* 560 F. Supp. 207, 210-211 (N.D.N.Y. 1983). District Judge Miner stated in that case, "In light of the extensive regulatory scheme provided for in the New York Public Service Law, it is clear New York closely supervises the grant of franchises to, and the subsequent operations of, telephone corporations." *Id.* at 211. Also, the aspects of defendant's business about which plaintiffs complain were, and still are, contemplated and regulated with great scrutiny by both statute and the PSC.

Finally, I draw support for these findings and conclusions in that the statutory scheme illustrated in *Mobilfone, supra,* 571 F.2d 141, is virtually identical to

Article V of New York's Public Service Law. In *Mobilfone,* the court found the regulatory plan sufficient for granting state action immunity under *Parker v. Brown, supra,* to a privately owned and operated telephone company. Thus, in finding New York's policy to be one which articulates and expresses a clear intent to displace unfettered competition with regulated market activity, I conclude that the first prong of the *California Liquor Dealers* criteria is satisfied. *See California Liquor Dealers, supra,* 445 U.S. at 105.

As to the second prong of this test, namely "active supervision", it is clear that New York, through the PSC, actively supervises the rates and business practices of telephone companies, and in particular those of defendant New York Tel. Unlike the facts in *California Liquor Dealers,* where there were no statutory provisions for establishing or reviewing the reasonableness of rates and services, here as authorized by the Public Service Law, New York's Legislature has expressly conferred such powers upon the PSC; as a result, the commission can set rates, mandate services, examine all contracts and review the reasonableness of these varied aspects of the telephone companies' operations. *See California Liquor Dealers, supra* at 100-101, 105-106; *see also Turf Paradise Inc. v. Arizona Downs,* 670 F.2d 813, 823-824 (9th Cir.), *cert. denied,* 456 U.S. 1011 (1982) (provides discussion of the lack of supervision noted in *California Liquor Dealers, supra) and compare with* N.Y. Pub. Serv. L. §§90 *et seq.; North v. New York Telephone Co.,* 1980-81 Trade Cas. ¶63675 (S.D.N.Y. 1980) (implementation of rate structure constitutes an act of the state which is actively investigated, determined and supervised). So long

as a program calls for active state involvement in the operative anticompetitive decisions, such as through hearings, deliberation and active administrative review, the private party (defendant) should receive immunity under *Parker.* Areeda, *Antitrust,* Supp. ¶212.7 at 71; *Gas Light Co. of Columbus v. Georgia Power Co.,* 440 F.2d 1135, 1140 (5th Cir. 1971). Thus, I conclude that the "active supervision" criterion is satisfied in the situation presented here so that this court can properly accord defendant, New York Tel, state action immunity in regard to the antitrust violations plaintiffs allege in their complaint.

It must be noted that this court is not persuaded by plaintiffs' argument that the challenged conduct must be compelled by the state if immunity is to be granted. The compulsion requirement should be examined in light of the factual context. In *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), the Court was unable to find either an intent to displace competition or adequate state supervision. *See* 1 Areeda & Turner, *Antitrust,* ¶215 b 3 at 96. The immunity under *Parker* ought to flow from state supervision in furtherance of its anticompetitive intent, not from the state's compulsion of private conduct. *Id.* at ¶215 b 2, 95. Thus, I conclude that when the two criteria of *California Liquor Dealers* are satisfied, as in my judgment they are here, state compulsion of the acts complained of is not required in order to find that state action immunity exists. *See Turf Paradise, Inc., supra,* 670 F.2d at 823 n.8; *Mobilfone, supra,* 571 F.2d at 143-144 (citing *Bates v. State Bar of Arizona,* 433 U.S. 350,

361 (1977)); 1 Areeda & Turner, *Antitrust*, ¶214 b1, 215 b-215 b2; Areeda, *Antitrust*, Supp. ¶212.5; Handler, *Antitrust-1978*, *supra* at 1384.

In addition, I cannot accept plaintiffs' contention that conduct initiated by the private party is forever barred from *Parker* immunity, for *Parker v. Brown* itself involved a state policy that was initiated by the private business sector. 1 Areeda & Turner, *Antitrust*, ¶213a at 72. Consequently, the plaintiffs' allegations that some of the conduct complained of had its origin within New York Tel will not defeat the finding that state action immunity exists. *See Bates*, *supra*, 433 U.S. at 361; *Gas Light Co. of Columbus*, *supra*, 440 F.2d at 1140; *Allstate Insurance Co. v. Lanier*, 361 F.2d 870, 872 (4th Cir. 1966); 1 Areeda & Turner, *Antitrust*, ¶212c, 213a, 213b, 213e, 215b 2 at 96, 217b 3; Handler, *Antitrust-1978*, *supra* at 1377.

Many of the cases cited by plaintiffs in their opposing Memorandum to support their arguments concerning the above mentioned compulsion requirement and the initiation of state policy by a private party are not applicable to the facts here. A majority of these cases involved litigation addressed only at the newly developing telephone terminal equipment market. In these cases, the courts properly noted that state policy was silent, or at best neutral, with regard to this aspect of the telecommunications industry. Secondly, it has been well noted that this aspect of the market was not on the same level of concern as were rates and services. In many ways, these cases present situations most similar to the state's light bulb policy examined in

Cantor, supra, 428 U.S. 579. For these reasons, I do not find such cases controlling in this matter. Furthermore, if the conspiracy count, Count IV, is a pendent state claim, it falls under the dismissal of the federal claims by the ruling herein. *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966); *Kavit v. A. L. Stamm & Co.,* 491 F.2d 1180 (2d Cir. 1974).

For the above reasons, it is my judgment, that the defendant is entitled to prevail on the first ground stated in its Notice of Motion, "state action" immunity. The motion of the defendant for judgment on the pleadings is granted, and judgment shall enter in its favor dismissing the complaint in its entirety.

It is so Ordered.

Dated: January 24, 1984
Albany, New York.

JAMES T. FOLEY
SENIOR U.S. DISTRICT JUDGE

APPENDIX B2

Judgment of the United States District Court for the Northern District of New York

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

82-CV-789

HON. JAMES T. FOLEY

CAPITAL TELEPHONE COMPANY INC. et al.,

v.

NEW YORK TELEPHONE COMPANY.

[ ] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[xx] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

Appendix B2—Judgment of the United States District Court for the Northern District of New York.

IT IS ORDERED AND ADJUDGED

that Judgment be entered in favor of Defendant NEW YORK TELEPHONE COMPANY and against Plaintiffs CAPITAL TELEPHONE COMPANY, INC., PETER A. BAKAL, TRI-CITIES TELEPHONE COMPANY INC. and CAPITAL DISTRICT ANSWERING SERVICE, INC. in accordance with Memorandum-Decision and Order.

I CERTIFY THAT
THIS IS A TRUE COPY
J.R. SCULLY
CLERK, U.S. DISTRICT COURT

(ILLEGIBLE)
DEPUTY

JOSEPH R. SCULLY
CLERK

(ILLEGIBLE)
(BY) DEPUTY CLERK

DATE 1/24/84

APPENDIX C

Section 2 of the Clayton Act, 15 U.S.C. Section 13

§13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed

to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Appendix C—Section 2 of the Clayton Act, 15 U.S.C. Section 13.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Appendix C—Section 2 of the Clayton Act, 15 U.S.C. Section 13.

Furnishing services or facilities or processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Oct. 15, 1914, c. 323, §2, 38 Stat. 730; June 19, 1936, c. 592, §1, 49 Stat. 1526.

APPENDIX D

Testimony of Paul L. Gioia before Legislative Commission on Science and Technology and Assembly Committee on Corporations, Authorities and Commissions, Feb. 24, 1982

TESTIMONY OF PAUL L. GIOIA, CHAIRMAN, NEW YORK STATE PUBLIC SERVICE COMMISSION BEFORE THE LEGISLATIVE COMMISSION ON SCIENCE AND TECHNOLOGY AND THE ASSEMBLY COMMITTEE ON CORPORATIONS, AUTHORITIES AND COMMISSIONS, FEBRUARY 24, 1982.

Telecommunications Regulation in New York State

Introduction

Thank you for inviting me to present the views of the Department of Public Service on the question of regulation of the telecommunications industry in New York State.

The telecommunications industry is a dynamic and expanding industry whose potential is only beginning to be recognized. The need for legislative and regulatory changes to permit full technological and economic development is becoming more apparent and, in our judgment, warrants your immediate and serious consideration.

For the past decade the Public Service Commission has recognized the benefits of a competitive telecommunications marketplace and has been a leader in advocating and encouraging competition and deregulation in the segments of the telecommunications industry.

Appendix D—Testimony of Paul L. Gioia before Legislative Commission on Science and Technology and Assembly Committee on Corporations, Authorities and Commissions, February 24, 1982.

Background

Before discussing needed changes to the existing statute, it may be useful for me to make some brief comments concerning regulation in general. Governmental regulation is normally imposed to control potential or actual abuses arising from a monopoly of the supply of an essential service. Where conditions of natural monopoly exist or where forms of monopoly power are evident, governmental intervention is generally thought necessary to protect the public from restrictions of output that would harm consumers, the imposition of unjust or excessive rates, or discriminatory business practices.

As a matter of basic economic philosophy and governmental policy, deregulation should be considered whenever it appears that the underlying circumstances which justified governmental intervention in the first place, no longer exist. For example, when, as a result of changing technology a market which had once been a natural monopoly becomes competitive. Just such a change has occurred in parts of the telecommunications industry. Certain market segments are now highly competitive and no longer exhibit natural monopoly characteristics. Other markets are evolving into a competitive environment and still others, such as basic exchange service, may become competitive in the future as technology advances and alternate telecommunications media are developed. The present state of development of the competitive markets require prompt re-examination of government policies, both

federal and state, to assured that the consumer benefits to the greatest extent possible from the innovation, variety and lower costs that only a free, competitive market can provide.

Since the enactment of Article 5 of Public Service Law in 1910, the communications industry, quite obviously, has undergone dramatic changes. However, the regulatory requirements and structure contained in Article 5 of Public Service Law have remained virtually unchanged over this 70 year period. The Public Service Law is all encompassing to the extent that it *requires* regulation of all telephone services provided by telephone companies and the regulation of telephone services provided by anyone seeking to enter the marketplace. The statute as presently drawn has become a barrier to the entry of potential competitors into what have become, competitive markets. Changes in the statute are needed to promote the development of a healthy telecommunications industry in this State, and the economy of the State as a whole.

Current Industry Structure

The companies with which the PSC now deals or may deal in the future may be divided into two groups. One group consists of traditional "landline" telephone companies that provide basic exchange telephone service as well as, terminal equipment, customer premises wiring and a variety of intercity toll and private line services. The second group consists of companies who do not provide basic exchange telephone service. Currently, the

Appendix D—Testimony of Paul L. Gioia before Legislative Commission on Science and Technology and Assembly Committee on Corporations, Authorities and Commissions, February 24, 1982.

Commission regulates a number of such companies that provide radio-telephone utility (RTU) service. In the future, we expect to be requested to permit the provision of competitive intercity services by companies commonly referred to as Other Common Carriers such as Microwave Communications, Inc. (MCI) and Southern Pacific Communications (SPC). Other potential entrants not providing basic exchange telephone service include cable TV companies supplying data services, burglar alarm companies, communications resellers and companies that enhance telephone service or perform special services dependent on the telecommunications network.

The first group—the providers of basic exchange telephone service—will continue to supply basic exchange service on a monopoly basis within their franchise territories for the foreseeable future. However, when these companies are permitted to offer competitive services in conjunction with monopoly basic exchange telephone service, the potential exists for a cross-subsidy of the competitive offerings. Therefore, to the extent that providers of monopoly telephone service are permitted to provide competitive services on a deregulated basis, it is imperative that regulatory safeguards be instituted to protect against cross-subsidies.

The second group of companies may not require state regulation at all. For example, radio-telephone utilities serve what is now a highly competitive market. Resellers of telephone service should also be exempt from

regulation since they are engaged in the provision of services that we already subject to regulation. Some other markets may simply require regulatory oversight to ensure a logical development of services available to the public. Such may be the case with the interconnection of cable television companies should they develop alternative two-way communications distribution networks.

PROPOSED LEGISLATIVE CHANGES

There are two possible approaches which the Legislature may take to bring about needed deregulation of telecommunications in this State. The first would be a general grant of authority to the Commission to deregulate markets or geographical areas where, in its judgment, effective competition renders regulation unnecessary to protect the public interest. A commission decision to deregulate a particular market would, of course, be subject to full public scrutiny and would be based on such factors as the number of suppliers of the service and the market share of each, regulated and unregulated alternatives available to consumers, and whether a deregulated market would result in a greater variety of products and services for the consumer and would stimulate competitive prices and higher levels of quality. When such an action involved a basic exchange telephone carrier, the Commission would continue to require accounting safeguards or structural separation of the monopoly and competitive segments of the business in order to prevent any cross-subsidies. The chief

advantage of this approach is that it would give the Commission the flexibility needed to accommodate the very rapid pace of change in the telecommunications industry.

A second approach would be for the Legislature to authorize the Commission to deregulate specific carriers or markets upon a finding that regulation is not needed to protect the public interest. This approach was taken by the Legislature last year with respect to telegraph services. Other potential candidates for this type of treatment would be radio-telephone utilities; the data, private line and alarm services offered by cable television companies; telephone resellers; alarm companies; and the intercity toll services which could be offered by carriers such as MCI and Southern Pacific. The main drawback with such specifically targeted legislation is that rapid changes in technology would render it obsolete in a relatively short time.

We do not believe that the need for legislative change in New York is affected by the proposed AT&T antitrust settlement. The settlement would not change our regulatory responsibilities. It accomplishes a corporate restructuring designed primarily to segregate competitive from noncompetitive telecommunications services. The FCC's Computer II Decision does to some degree, alter our regulatory scope. The FCC's decision requires the establishment of fully separated affiliate by the Bell System for the provision of all new customer premises equipment and enhanced services. Under the FCC's decision these services would be provided on a non-regulated basis. Terminal equipment and enhanced

services. however, are but two of several competitive submarkets within the communications industry.

Another factor that should be addressed at this time is the pending revision of the Communications Act of 1934. The Senate has passed a bill and the House of Representatives is considering a bill, both of which seek to deal with the evolving nature of the telecommunications industry. The proposed legislation follows the general approach taken by the FCC, in requiring the establishment of a separate AT&T subsidiary to provide competitive services on a deregulated basis. Intrastate toll services which are currently regulated by state PSC's would, however, be subject to FCC jurisdiction under the Senate version and subject to FCC jurisdiction in five years under the House version.

These legislative proposals, however, do not obviate the need for timely changes in the regulation of the telecommunications industry in New York State.

EFFECT OF DEREGULATION ON THE INDUSTRY

We have already seen instances where potential entrants into the intercity market have been discouraged from coming into New York simply to avoid regulation. Likewise, some cable TV and burglar alarm firms have indicated their interest in common carrier type operations but only if they can avoid the burden of regulation. Thus, it is likely that a change in Public

Appendix D—Testimony of Paul L. Gioia before Legislative Commission on Science and Technology and Assembly Committee on Corporations, Authorities and Commissions, February 24, 1982.

Service Law to permit deregulation of certain markets will spur economic development in the telecommunications industry.

A case in point would be the deregulation of telegraph service enacted in this State in June of last year. Since then the prices of the major carrier, Western Union, have remained at nationwide levels and we are aware of no consumer complaints about rates or quality of service. More importantly, the deregulation of telegraph service has freed my staff of time consuming rate case work and prompted one new firm to enter the New York market. Shortly after passage of the deregulation legislation, IT&T Worldcom initiated telegraph service on many intrastate routes, and RCA and WUI currently have pending before the FCC an application to offer Telex and TWX service including service between cities in New York.

In the Notice of Public Hearings you have specifically asked that radio-telephone issues be addressed. With the exception of New York Telephone Company, which may be precluded from this market if it is deregulated, all radio-telephone services provided by landline telephone companies and all radio services provided by radio-telephone utilities can and should be deregulated.

In addition to the radio-telephone services provided by landline companies, over 50 companies have been established over the last decade in New York State to provide paging and two-way mobile services. In recognition of the number of providers, the Commission has taken two steps to reduce the degree of our

regulatory involvement. First, we established expedited, simplified procedures which allow for public input but which obviate full scale public hearings in granting uncontested Certificates of Public Convenience and Necessity. Second, we encouraged the filing by both landline telephone companies and radio-telephone companies of what we call "flexible tariffs". Under this system, the Commission approves, in advance, a range of possible prices for radio-telephone services. Once this range of prices is approved, a company is free to change its price within the range on as little as three days' notice to the Commission. Normal tariff filing procedures take as long as 60 days. Total deregulation would eliminate the concern that once a company has made an investment in New York our regulatory policy would become more stringent and would permit these companies to respond even more quickly to different market conditions, competitive forces and consumer demands. It should encourage further entry by new companies and being new services to the market more rapidly than can currently be achieved under present regulation.

In deregulating the radio services of landline telephone companies safeguards are necessary to avoid possible subsidy of the competitive portion of the business by monopoly services. Currently, landline telephone companies providing radio-telephone service have established separate subaccounts for booking the investment associated with these services. Further, where possible, actual expenditures are separately tracked. Further separation through proper accounting

procedures can be introduced if this market is deregulated. For your information, nine states including New Jersey and Connecticut, do not regulate the operations of radio-telephone companies. Others are considering deregulation.

In all of the major population hubs of the State there are at least 3, and as many as 14, RTU's operating in competition with each other. With this competitive environment, the subscriber is offered a wide range of rates, services and features. The number of certified RTU's is growing as new companies enter the market. Even outside these areas there are actual competitive markets in operation or there are available radio frequencies to provide for competitive markets should monopolistic abuses appear.

The introduction of cellular radio-telephone systems may affect the need for regulation. Although there may be two providers of cellular radio service in a given market, this service does have the potential to replace basic exchange service currently provided through copper wires. In that case, regulation may be required.

Effect of Deregulation on Consumers and Employment Opportunities

In any action we take we must be mindful of the potential impact of deregulation upon basic telephone service. This resource must remain universally available, affordable and of high quality. It is generally accepted that cross-subsidies exist today in the telephone industry which are designed to keep the rates for basic exchange

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In The

Supreme Court of the United States

October Term, 1984

CAPITAL TELEPHONE COMPANY, INC., PETER A. BAKAL, TRI-CITIES TELEPHONE COMPANY, INC., and CAPITAL DISTRICT ANSWERING SERVICE, INC.

Petitioners,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER C. REID
(Counsel of Record)
JOHN M. CLARKE
GERALD M. OSCAR
Attorneys for Respondent
1095 Avenue of Americas
New York, New York 10036
(212) 395-6114

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QUESTION PRESENTED - A COUNTERSTATEMENT

1. Whether, in view of the regulatory framework enacted by the New York state legislature, coupled with the active implementation thereof in prior rulings of the Public Service Commission of the State of New York ("PSC" or "Commission"), respondent New York Telephone Company's rates and practices relating to the interconnection of local radio carriers are entitled to "state action" immunity under the principles of federalism embodied in the *Parker-Midcal-Southern Motor Carriers* doctrine?

LIST OF AFFILIATED CORPORATIONS

All of the parties to the appeal in the court below are set forth in the caption.

Respondent New York Telephone Company is a wholly-owned subsidiary of NYNEX Corporation, a Delaware Corporation. Empire City Subway Company is a subsidiary of respondent New York Telephone. NYNEX Corporation also owns or has an interest in New England Telephone Company, NYNEX Development Company, NYNEX Business Information Systems Company, NYNEX Mobile Communications Company, NYNEX Information Resources Company, NYNEX Materiel Enterprises Company and NYNEX Service Company. NYNEX Service Company partly owns Bell Communications Research, Inc.

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No. 84-1457

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Petitioners,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

New York Telephone Company ("respondent" or "Telephone Company") opposes, and files this brief in opposition to, the Petition by Capital Telephone Company, Inc. ("Capital" or "Capital Telephone"), Peter A. Bakal ("Bakal"), Tri-Cities Telephone Company, Inc. ("Tri-Cities Telephone") and Capital District Answering Service, Inc. ("Capital District") for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Second Circuit in Capital

Telephone Company, Inc., et al. v. New York Telephone Company, No. 84-717[illegible], issued on December 18, 1984.

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

A. Introduction

This case is governed by this Court's recent decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, ____ U.S. ____, No. 82-1922, issued on March 27, 1985. Through a detailed set of statutes, the State of New York has delegated to the PSC the obligation to consider alternative courses of utility conduct and to choose the appropriate course pursuant to the statutory standards. The conduct complained of by petitioners — involving interconnection rates and practices — is at the heart of this statutory scheme. Not only does the statutory scheme evince a legislative intent that the regulatory body closely orchestrate the activities in question, but the record in this case shows that the PSC has implemented that intent and actively supervised such conduct. Indeed, the challenged conduct about which petitioners complain has been the repeated subject of PSC proceedings conducted pursuant to the state statutes.

On numerous occasions over a period of more than fifteen years, petitioner, Peter A. Bakal, both individually or as the president and sole director of one or more petitioner corporations, has filed complaints with the PSC and the FCC regarding the identical claim raised in this case. The claim has always been that the Telephone Company's interconnection rates and practices "discriminate" against petitioners in that the Telephone Company provides services to itself or to other "landline" telephone companies which it does not provide to local "radio" enterprises, like petitioners; or that it provides such services on less favorable terms.

The specifics of Bakal's claim of economic discrimination have over the years been consolidated by him into a written list of fifteen separate grievances which Bakal has on a regular basis filed with regulatory agencies on both the state and federal levels. This same list was filed in the United States District Court below and was produced by petitioners in response to the Telephone Company's discovery requests relating to the substance of petitioners' claims. Indeed, Bakal conceded in the District Court that all of the Telephone Company's allegedly discriminatory rates and practices known to him were set forth in his written list; that he had submitted that list to both the PSC and the FCC but that those agencies, in Bakal's words, had "refused to provide plaintiffs with adequate relief for the specific items before them,"[1] (Pet. Br. in the District Court in Opposition to the Telephone Company's Motion to Dismiss, at p. 4). In plain words, Bakal disagrees with the conclusions of the regulatory agencies involved regarding the appropriate interconnection policy to be followed in New York State and wants the federal courts to alter or change those agency determinations.

The thrust of the complaint in the District Court is that, as a result of state policy, petitioners are being forced to pay tariff rates and charges for public utility services that they allegedly would not have to pay if the decisions of the PSC on the issue of "interconnection" between common carriers — that is, the PSC's decision to treat ordinary telephone companies on a different basis than "radio" telephone companies—had in fact been decided the other way.

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1. Specifically, petitioners' list details fifteen categories of expense which, as a result of the PSC's interconnection decisions, petitioners' claim they, as a local radio carrier, must pay but landline companies are not required to pay (Pet. App. A., p. 3a).

B. Petitioners' Complaints To The New York Public Service Commission

Capital Telephone and Bakal have both been granted certificates of public convenience and necessity by the PSC. The record indicates that the administrative and judicial dispute over the issue of alleged economic "discrimination" in connection with the Telephone Company's interconnection rates and practices began in 1968 and has continued unabated since that time. The following is a partial list of formal proceedings in which petitioner Bakal's interconnection claims in this action were investigated and acted upon by the PSC.

In *Complaint of Capital Telephone, Inc.*, Case 25738, 13 NY PSC 462, 466, (1973), Bakal and Capital complained to the PSC that the Telephone Company was improperly according more favorable treatment to another telephone company, the Pattersonville Telephone Company ("Pattersonville Telephone"), because Pattersonville Telephone was a "landline" company and Capital was not. Petitioners asked that the Telephone Company be required by the PSC, in the exercise of its statutory powers under the New York Public Service Law, to negotiate (or, in the alternative, that the Commission prescribe) an agreement under which the Telephone Company would deal with Capital in the same manner it allegedly dealt with "landline" telephone companies.[2] However, the PSC, after full evidentiary hearings, rejected Capital Telephone's argument. It recognized there was a basic difference between "landline" and "radio" lines of business and held that local radio companies and landline telephone companies should not be treated as "sister utilities" stating:

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2. The complaint renewed arguments advanced before the PSC by Bakal in still earlier cases, where his arguments had been received unfavorably. *Capital Mobile Radio Service, Inc.*, Case 25051, *Peter A. Bakal*, Case 25052 (both decided August 20, 1969), 80 Pub. Util. Rep. 3d (PUR) 445, 449.

> "That utilities have in common a liability to regulation does not erase differences in their functions and mode of operation.
>
> The main function of landline companies is to provide conventional telephone service to the general public; interconnection among such companies primarily supports this basic function." *Id.* at 473.

The PSC furthermore rejected Capital's contention that the tariff and the agreement which the Telephone Company had with Capital Telephone were "discriminatory" or "anti-competitive". The PSC ruled that simply because Capital had a certificate of convenience and necessity granted to it by the PSC under the Public Service Law did not mean that it should be dealt with on the same terms as a "landline" company. The PSC ruled further that the Telephone Company was not economically "discriminating" against Capital by refusing to share it landline toll revenues with it. The PSC also directed Capital to continue to pay for connecting circuits and radio tielines at tariff rates and ruled that the Telephone Company had properly charged for facilities used to effect direct dial interconnection of Capital to the telephone network.

Subsequently, in *Petition of Tri-City Telephone Company,* Case 26378, 14 NYPSC 994 (1974), issued July 1, 1974, the PSC, after full evidentiary hearings, again rejected a charge by petitioners that their local radio enterprises should be treated as if they were "landline" telephone companies. Reviewing its earlier *Capital* decision, the PSC commented:

> "[Capital Telephone's] claim was grounded upon an alleged discrimination by NYT between interconnected landline carriers (which share in toll revenues) and radio common carriers. We rejected

> Capital's contention, concluding that Capital was not the subject of discrimination. We noted that a simple comparison between NYT's agreements with landline independents and radio common carriers was not possible due to the differences in the activities of the utilities and the varying degrees of complexity associated with the contract arrangements between NYT and independents."

Petitioners' subsequent judicial review proceeding challenging this determination was denied by the New York courts. See, *Tri-City Telephone Co. v. Kahan*, 49 App. Div. 2d 126 (3rd Dept. 1975).

On May 26, 1978, petitioners again complained to the PSC about the Telephone Company's alleged "illegal, preferential and anti-competitive conduct" in purportedly favoring Pattersonville Telephone over Capital. Petitioners requested the PSC to "issue an immediate order mandating that plaintiffs and Pattersonville Telephone be treated equally by New York Telephone Company in the provision of interconnection facilities." The PSC Staff, after investigating petitioners' charges, found them to be "without merit" and recommended that petitioners' request for relief be denied. The Staff's memorandum reads in relevant part:

> "Bakal's complaints are predicated on the assumption that it is proper to compare the Bakal-NYT interconnection with the Pattersonville-NYT interconnection. We do not agree that this is the proper comparison. Pattersonville provides landline telephone service in a particular geographic area, using central office switching facilities to do so. Pattersonville also provides radio services, using a terminal interconnected with its central office equipment. We believe this is the operation that can properly be compared to Bakal . . .

> Fundamentally, Bakal is a radio telephone utility, not a wireline telephone company. Bakal is entitled to the same treatment as any other radio telephone utility, as well as the same treatment afforded the radio operations of the wireline carriers. We find that Bakal is being treated in a non-discriminatory fashion" (Emphasis in the original).

Based on this memorandum, the PSC wrote to petitioners that it was denying petitioners' request for an order mandating that Bakal, Capital and Pattersonville Telephone Company be treated as "sister utilities" in the provision of interconnection facilities.

In June and July of 1983, petitioners again complained to the PSC concerning alleged "unequal treatment" by the Telephone Company in terms of the latter's interconnection rates and practices vis-a-vis Pattersonville Telephone. By order of the PSC in Case 28677, the issue of "whether Capital Telephone is interconnected to New York Telephone's facilities under substantially the same circumstances as Pattersonville" was set down for a formal evidentiary hearing. That hearing is ongoing before the PSC at the present time.[3]

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3. Petitioners also raised the identical charges of "discrimination" in connection with the Telephone Company's alleged "anti-competitive" interconnection rates and practices before the FCC, setting forth fifteen separate services (the list of grievances) regarding which petitioners claimed to have suffered economic "discrimination" at the hands of both the Telephone Company and Pattersonville Telephone, including the issue of division of landline revenues and settlement agreements. The Court of Appeals summarizes the FCC's involvement with Bakal in its opinion (Pet. Appendix, pp. 4a-5a).

C. Statutory Framework of Telecommunications Regulation

State Regulation

The Telephone Company is a "telephone corporation" as defined by the New York Public Service Law § 2(17).[4] The scheme of regulation set forth in the Public Service Law displaces the unfettered business freedom that telephone corporations otherwise would have and subjects telephone corporations to close regulatory supervision.[5] Article Five of the statute contains the enactments relating to telephone rates and practices. The PSC is empowered to establish rates and charges for the interconnection of the lines of local carriers, "and to declare the portion thereof to which each of the corporations affected thereby shall be entitled, and

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4. "The term 'telephone corporation,' when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating or managing any telephone line or part of a telephone line used in the conduct of the business of affording telephonic communication for hire. . . ."

5. Section 94(2) provides in part:

> "The commission shall have general supervision of all . . . telephone corporations and . . . telephone lines within its jurisdiction as hereinbefore defined and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property are leased, operated or managed, conducted and operated with respect to the adequacy of and accommodation afforded by their service and also with respect to the safety and security of their lines and property, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements . . ."

the manner in which the same shall be secured and paid." Section 97(3). Each telephone corporation must in turn file with the PSC a complete schedule of all rates, rentals and charges for service. It must also file with the PSC a copy of any contract, agreement or arrangement in writing with any corporation, association or person relating in any way to the construction, use or maintenance of its lines or service. Section 92(1). No change in rates, charges or "in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility" may take place without notice to or approval by the PSC. Section 92(2). The PSC is empowered to investigate on its own motion or upon the complaint of any person any act done or omitted by a telephone corporation in violation of any provisions of law or any order of the PSC. Section 96. If the PSC, after a hearing, is of the opinion that rates, charges, or "the rules. regulations or practices of any telephone corporation affecting such rates, charges. rentals or service are unjust, unreasonable[6] or unjustly discriminatory or unduly preferential[7] or in anywise in violation of law" or that the maximum rates or charges are "insufficient," the PSC can set new maximum rates or "determine the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service thereafter to be installed, to be observed and used, and prescribe the same by order." Section 97(1) and (2). Sections 102 and 103 provide

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6. Every telephone corporation is required to furnish "such instrumentalities and facilities as shall be adequate and in all respects just and reasonable . . ." Section 91(1).

7. Section 91(3) provides that:

> "No . . . telephone corporation shall make, or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

enforcement proceedings and penalties for violation of any provision of Article Five or any order, direction or requirement of the PSC.

D. District Court Determination

The Telephone Company moved in the District Court below to dismiss the complaint on the ground that the Telephone Company's interconnection rates and practices with respect to local radio carriers were immunized from the operation of the federal antitrust laws under the "state action" immunity doctrine.

In granting the Telephone Company's motion, the District Court held that "state action" immunity existed under the *Parker-Midcal* line of cases. After examining the New York State Public Service Law, the New York courts' interpretation of that statutory scheme and the State's legislative activity in the telecommunications industry, the Court concluded that close and active regulation and supervision of the Telephone's Company's rates and business practices by both state law and the PSC had clearly satisfied the two-pronged test articulated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) for the application of a "state action" immunity defense.

E. The Decision and Judgment of the Court of Appeals - Second Circuit

The Court of Appeals affirmed, holding that New York State's current policy clearly requires the imposition of regulatory controls over unfettered competition in the telephone industry and that the New York Legislature had given the PSC an active role in the implementation of that policy. Accordingly, the Court said, in the absence of evidence of an intent by Congress to preempt the field of telecommunications, or the existence of an irreconcilable conflict between state and federal law, a holding

that a state's own regulatory scheme may not supersede the operation of the federal antitrust laws "would challenge the federalism on which our governmental system is based".

ARGUMENT

I.

THE SECOND CIRCUIT WAS CORRECT IN HOLDING THAT PETITIONERS' ANTITRUST CLAIMS ARE BARRED BY THE STATE ACTION IMMUNITY DOCTRINE.

A. State Policy

Bakal argues that a "clearly articulated and affirmatively expressed" state policy requires a specific language statement in the New York Public Service Law announcing New York State's intent to displace competition with regulation in the telecommunications industry (Petition, pp. 9-11). However, this Court held in the *Southern Motor Carriers Rate* case, *supra,* that a private party, like the Telephone Company, "acting pursuant to an anti-competitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." According to this Court's opinion, "as long as the state as sovereign intends to displace competition in a particular field with a regulatory structure," the first prong of the *Midcal* test is clearly satisfied. *Id.* As this Court said:

> "If more detail than a clear intent to displace competition were required of the legislature, states would find it difficult to implement through regulatory agencies their anti-competitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express

> authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness."

Accordingly, a state policy exists when it is found "from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of." *Lafayette,* 435 U.S. at 415 (plurality opinion); *Town of Hallie v. City of Eau Claire,* ____ U.S. ____, No. 82-1832, issued March 27, 1985 ("It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects . . ."); *Princeton Community Phone Book, Inc. v. Bates,* 582 F.2d 706, 717 (3rd Cir.) *cert. den.,* 439 U.S. 966 (1978)("the state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made"); *Hybud Equipment Corp. v. Akron, Ohio,* 742 F.2d 949, 960 (6th Cir. 1984)("a legislative intent to displace competition may be inferred from the legislature's delegation of authority"); Morgan, *Antitrust and State Regulation: Standards of Immunity After Midcal,* 35 Ark. L. Rev. 453, 464-65 (1981)("[A]uthority to regulate may be implied in general delegations of authority. Any restraints based on such implied legislative decisions must, however, be basic to the regulatory program's functioning").

Put differently, the courts are required, as the Second Circuit expressed it below, to ascertain whether the challenged action is "reasonably related" to an agency's express powers and "reasonably designed" to promote state aims within a designated field of regulation (Pet. App. A, p. 891); *accord, Preferred Communications, Inc.,* 1985-1 Trade Reg. Reports, ¶ 66,452 (9th Cir., March 1, 1985); *Catalina Cablevision Assoc. v. City of Tucson,* 745 F.2d 1266, 1269 (9th Cir. 1984).[8]

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8. Petitioners' reliance on *Capital Telephone Company, Inc. v. Pattersonville Telephone Co., Inc.,* 56 N.Y.2d 11 (1982) for the proposition

(Cont'd)

The challenged conduct in this case clearly meets that standard as demonstrated by respondent's Counterstatement of the Case above.

B. Active State Supervision

It is clear from the record that Bakal has presented only a single complaint to the District Court below, *i.e.*, the alleged discriminatory nature of New York State's interconnection policy—a policy which defines the terms and conditions under which an ordinary so-called "landline" telephone company, like New York Telephone, is required to connect its lines with local "radio" telephone companies. As previously explained, the thrust of petitioners' claim is that they are being forced to pay charges set forth in PSC tariffs, *i.e.*, the fifteen items of expense detailed in petitioners' list of grievances, which expense they contend they would not have had to endure if the PSC's policy on interconnection had developed in line with petitioners' views on the matter. However, the issue of what is an appropriate interconnection policy has been several times litigated before the

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(Cont'd)

that it is not the policy of New York State to grant immunity from its own state antitrust laws (and therefore, by extension, from the federal antitrust laws) is, as the Second Circuit held below, entirely inapposite (Petitioners' Appendix A, p. 25a). Since only a state statute was there involved, neither the issue of the applicability of the doctrine of federal preemption through the operation of the Supremacy Clause nor, for that matter, this Court's interpretation of that doctrine in the *Southern Motor Carriers* case, *supra*, was before the court in that case. The question decided there was simply whether a previous PSC complaint by plaintiff Capital Telephone against the New York Telephone Company had collaterally estopped the former from suing another telephone company, Pattersonville Telephone Company, under New York State's Donnelly Act.

PSC as have the specifics of petitioners' list of grievances.[9] As often as petitioners have urged that local radio telephone companies and ordinary telephone companies should be treated as "sister utilities," the PSC has, after evidentiary hearings, rejected such an alternative course of conduct as a matter of state policy.

Moreover, as is evident from a reading of the relevant provisions of the New York Public Service Law, that statute was enacted, *inter alia,* both to formulate state policy regarding the interconnection of common carriers and to identify and deal with allegations of the very type made by petitioners in their list of grievances — allegations of "unjust," "unreasonable" and "discriminatory" rates and business practices. The PSC has in this case explicitly implemented that statutory mandate by specifically addressing each and every recommendation and alternative put forward by petitioners over the years. No firmer satisfaction of the "active supervision" prong of the *Midcal* analysis could reasonably be asked or required. Petitioners' contentions to the contrary (Petition, pp. 11-12) are clearly wrong.

C. Compulsion

In the *Southern Motor Carriers Rate Conference, Inc. v. United States, supra,* this Court resolved an apparent conflict between the Fifth and Second Circuits as to whether the actions of a private party must be "compelled" by the state in order to

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9. Contrary to the statement made at p. 12 of the Petition, the PSC has considered all of the items contained in Bakal's list of grievances including Bakal's request for a division of revenues or EAS settlement and has rejected them. Bakal's demand for a division of revenues and the PSC's disposition of it was also the subject of a judicial review proceeding brought by petitioners' in New York State Supreme Court. See footnote 2 to the Second Circuit's opinion in this case (Pet. App. A, pp. 4a-5a).

be protected from the federal antitrust laws. This Court held that, contrary to the position espoused by petitioners in this case, the federal antitrust laws do not forbid a state to adopt policies that permit, but do not compel anti-competitive conduct by regulated private parties. *Id.* As this Court noted the first prong of the *Midcal* test is satisfied, even in the absence of a statute expressly permitting the challenged conduct, where the legislature has made clear that the details of an allegedly anti-competitive scheme are to be left to the discretion of a designated regulatory agency, rather than to the marketplace. *Id.*[10]

The Court summed up its position on the "compulsion" requirement as follows:

> The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it encourages states to require, rather than merely permit, anti-competitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary." (Emphasis in original.)

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10. Section 97(3) of the New York Public Service Law not only authorizes the PSC to establish rates and charges for interconnection purposes but also "to declare the portion thereof to which each of the corporations affected thereby shall be entitled and the manner in which the same shall be secured and paid."

D. State Regulation and Federalism

The petitioners contend that immunizing the practices at issue here from the scope of the antitrust laws "conflicts with the official regulatory policy of the State of New York" and "conflicts with the federalism doctrine" (Petition, p. 20). They are wrong.[11]

Clearly, the New York Legislature has deregulated portions of the communications industry in New York where those particular portions of the industry have become highly competitive. However, contrary to the suggestion of petitioner, the telephone services at issue in this case have not been deregulated. Thus, regulation remains the official policy of the state with respect to those services. The address of the Chairman of the New York Public Service Commission to members of the New York Legislature (Petition, Appendix D) is very instructive on this point. In his address he called for deregulation where appropriate and he established a division between (a) "landline" telephone companies such as New York Telephone that provide basic exchange telephone service and (b) companies such as petitioners' that do not provide such service (Petition, pp. 58a-59a). He then stated (Petition, p. 59a):

> The first group — the providers of basic exchange telephone service — will continue to support basic

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11. Petitioners also make the statement that the terms under which basic exchange facilities are connected to the facilities of the petitioners are not subject to regulation by the New York Public Service Commission (Petition, p. 20). In a rate proceeding before the PSC petitioners' counsel took the position that the compensation to the regulated operations of the Telephone Company for services and facilities used by unregulated operations were subject to the scrutiny of the PSC. This position was upheld by the Administrative Law Judges in that proceeding (NYPSC Case 28961, Ruling on Motion to Compel Interrogatory Responses, issued March 12, 1985). Moreover, as noted earlier, the petitioners have invoked the jurisdiction of the New York PSC in a proceeding now pending with respect to their complaints as to interconnection. The Telephone Company recognizes, and so do the petitioners, the jurisdiction of the New York PSC in this matter.

> exchange service on a monopoly basis within their franchise territories for the foreseeable future.
>
> * * *
>
> The second group of companies may not require state regulation at all. For example, radio-telephone utilities serve what is now a highly competitive market.

Following Chairman Gioia's address, the New York State Legislature did, in fact, amend the Public Service Law so as to deregulate radio-telephone companies. And, consistent with the point made in Chairman Gioia's address, the Legislature retained under regulation the provision by landline telephone companies of basic exchange service.[12] Thus, the terms under which New York Telephone permits petitioners to connect to the basic landline exchange network — the matter at issue — is very much still a part of the state's regulatory scheme.[13]

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12. At several places in their petition, petitioners refer to Chapter 564 of the New York State Laws of 1984 (Petition, p. 6 fn., p. 10 fn., p. 6 fn.) and they state that Chapter 564 "deregulated the specific radio-telephone services at issue in this case." (Petition, p. 10 fn.). These references are irrelevant and petitioners' statement is flatly wrong because, as indicated above, the Telephone Company rates and services at issue here were not deregulated.

13. Petitioners have also misleadingly referred to PSC statements that the PSC is not the enforcer of the antitrust laws (Petition, p. 18). Petitioners would leave the impression that they have no forum for their complaint if not the antitrust court. That is wrong. The PSC does consider the conduct in question — but pursuant to the standards of the New York regulatory statute and not simply the antitrust standards. Indeed, even the correspondence cited by petitioners demonstrates that the PSC does provide a forum for the complaints of petitioners (Pet. Appendix F).

Indeed, New York State's deregulation of radio-telephone companies is a further indication of the care the New York Legislature has taken with respect to the delineation of the deregulated versus the regulated segments of businesses in New York. Its prior singling out of telegraph companies for deregulation was an action that, in the words of the Second Circuit, "leads inescapably to the conclusion that it viewed continued regulation of the telephone industry as necessary to displace competition in the public interest" (Pet. Appendix A, p. 17a). Similarly, the Legislature's deregulation of radio companies is further confirmation that it intends to continue the regulation of landline telephone companies.

Petitioners' further contention that immunization causes a conflict with the principles of federalism is certainly far-fetched. The principles of federalism were the basic underpinnings of the *Parker-Midcal-Southern Motor Carriers* doctrine. The principles of federalism clearly support the decision of the Court of Appeals below.[14]

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14. Petitioners' reference to Judge Greene's decision is clearly misplaced. Whether or not Judge Greene's analysis was correct, he certainly was dealing with a far different situation. He was dealing with a nation-wide Bell System. The outcome of Judge Greene's decision was the break-up of that system. New York Telephone is now restricted, in essence, to local intrastate telephone service. At issue in this case is the connection of local radio companies to New York Telephone's local basic exchange network. Clearly, the New York Public Service Commission has the right to regulate that connection.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Walter C. Reid
(Counsel of Record)

John M. Clarke
Gerald M. Oscar
Attorneys for Respondent

1095 Avenue of Americas
New York, New York 10036
(212) 395-6114

(3)

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IN THE

Supreme Court of the United States

October Term, 1984

CAPITAL TELEPHONE COMPANY, INC., PETER A. BAKAL, TRI-CITIES TELEPHONE COMPANY, INC., and CAPITAL DISTRICT ANSWERING SERVICE, INC.,

Petitioners,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KEITH J. ROLAND*
USHER FOGEL
EMILIO A.F. PETROCCIONE
Attorneys for Petitioners

ROLAND & FOGEL
1 Columbia Place
Albany, New York 12207
(518) 434-8112

* *Counsel of Record*

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

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LIST OF AFFILIATED CORPORATIONS

A listing of all affiliated corporations is set forth in the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit at p. ii.

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This brief is filed on behalf of Capital Telephone Company, Inc., Peter A. Bakal, Tri-Cities Telephone Company, Inc., and Capital District Answering Service, Inc. ("petitioners") in reply to the Brief in Opposition for a writ of certiorari to the United States Court of Appeals to the Second Circuit, filed in this docket by New York Telephone Company ("respondent").

ARGUMENT

I

NEW YORK TELEPHONE MAY NOT BE AFFORDED ANTITRUST IMMUNITY UNDER THIS COURT'S MOST RECENT DECISION IN *SOUTHERN MOTOR CARRIERS CONFERENCE*.

A. New York State Does Not Intend To Displace Competition In The Telecommunications Industry.

State action immunity will be conferred only where the challenged activity is undertaken pursuant to a clearly articulated and affirmatively expressed policy of the State itself to displace the antitrust laws. *California Retail Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Respondent, citing liberally from this Court's March 27, 1985 decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, _____ U.S. _____, No. 82-1922, asserts that such state policy can be inferred from the general regulatory framework embodied in the New York Public Service Law as well as the reasonable relationship that exists between the actions challenged by petitioners and the express powers of the New York Public Service Commission (Brief in Opposition, pp. 11-12). Respondent, as well as the Second Circuit, ignore the ruling of the New York Court of Appeals in *Capital Telephone Co. v. Pattersonville Telephone Co.*, 56 N.Y. 2d 11 (1982), which found that it is not the public policy of the State of New York to displace competition in the telecommunications industry.

This Court's recent *Southern Motor Carriers* decision held that the first prong of the *Midcal* test is satisfied only where "... the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure..." _____ U.S. _____. Although the State does not have to describe the implementation of its policy in every detail, the intent of the State to establish an anticompetitive program and displace competition in the affected industry must be "clear",

_____ U.S. _____. This is consistent with previous rulings of this Court that provide that exemptions to antitrust liability are disfavored and are to be narrowly applied, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). Therefore, by this Court's declaration in *Southern Motors*, anything less than a *clear* intention to displace competition with regulation will not satisfy the first *Midcal* prong. Here, not only does there not exist a *clear* intention to displace competition, but as the *Pattersonville* decision indicates, such competition in the telecommunications industry may co-exist with the Public Service Law's regulatory provisions.

In *Pattersonville*, the plaintiff brought an action under New York State's antitrust law (Donnelly Act, N.Y. Gen. Bus. Law Section 340 (McKinney, 1968)), against Pattersonville Telephone Company alleging that it had, in combination with other parties, conspired to obtain favorable treatment from New York Telephone thereby enabling it to charge below cost tariff rates. The defendant argued that, *inter alia*, the plaintiff's suit was barred under the doctrine of collateral estoppel because the Public Service Commission had previously ruled that New York Telephone did not violate the just and reasonable standard codified in Section 91 of the New York Public Service Law (56 N.Y.2d at pp. 16-17). The New York Court of Appeals rejected the defendant's argument and unequivocally held that approval of a practice challenged as anticompetitive by the New York Public Service Commission will *not* preclude an aggrieved party from instituting a state antitrust action challenging that practice (56 N.Y.2d at 15; Pet. App. A., p. 26a).

Particularly instructive was the recognition by the Court of Appeals of the different standards guiding the application of the Public Service Law in comparison to the purpose of the antitrust law, which was to protect the marketplace from illegal competition:

> The question before the PSC was whether under section 91 of the Public Service Law the charge made by NYT to plaintiffs was an 'unjust or unreasonable charge' (subd 1), 'greater or less compensation for any service rendered' than that charged or received from any other person for 'a like and contemporaneous service' (subd 2) or gave 'any undue or unreasonable preference or advantage to any person, corporation or locality' (subd 3). The question to be decided by the court in this Donnelly Act action is whether '[c]ompetition or the free exercise of any activity * * * in the furnishing of any service * * * is or may be restrained' or 'the furnishing of any service in this state is or may be restrained' for the purpose of 'establishing or maintaining [a] monopoly or unlawfully interfering with the free exercise of any activity' (General Business Law, Section 340, subd 1). (56 N.Y.2d at 18-19).

Since these standards are different, a prior favorable ruling by the Public Service Commission in no way impairs a subsequent claim on the basis of the New York State antitrust law:

> In the trial of the instant action the fact that the PSC found NYT's activity 'not illegal as a matter of law' will not constitute a defense because discrimination which may be justifiable under section 91 of the Public Service Law 'may still be unlawful if it can be shown to have actually restrained competition'. (56 N.Y.2d at 19).

Even where the defendant's activities were based on tariffs filed with the Public Service Commission, there would be no immunity from antitrust liability. As the Court noted,

> The fact that the charges made by NYT and Pattersonville are based on tariffs filed by those utilities does not protect the utilities or others acting in combination with them from antitrust liability. (56 N.Y.2d at 18, citations omitted).

Similarly, the Court further observed:

> . . . The jurisdiction of the PSC to accept tariffs for filing and entertain customer complaints of discrimination does not give it exclusive jurisdiction of a competitor's antitrust action . . . (56 N.Y.2d at 16).

In view of the foregoing, it is clear that the New York Court of Appeals necessarily determined that the State's decision to regulate the telephone industry is not inconsistent with the principles of competition and that the State did not intend to displace competition with regulation. On the basis of the holding in *Pattersonville*, Judge Pierce in his dissenting opinion concluded:

> Thus, one must conclude that New York's antitrust law and Public Service Law fulfill different but complementary functions with regard to the telephone industry, and, further, that Public Service Commission regulation does not conflict with a policy of free competition in the telephone industry. (Pet. App., p. 32a).

The holding in *Pattersonville* was directly in accord with the New York Court of Appeals' prior ruling in *Columbia Gas of New York, Inc. v. New York State Electric and Gas Corporation*, 28 N.Y.2d 117 (1971), where a public utility was allowed to challenge the practice of another utility on the ground that it violated the state antitrust law. The Court held that because the state antitrust law encourages a vigorous public policy in favor of free competition, the Court would not preclude prosecution under the antitrust laws where the actions of the utility may have restrained competition (28 N.Y.2d at 127-128).

It is well established that the Federal Courts must defer to the interpretation of state law by the highest court of the state, *Hortonville J.S.D. No. 1 v. Hortonville Ed.*, 426 U.S. 482, 488 (1976); *Eisenstadt v. William R. Baird*, 405 U.S. 438, 440 (1972).

This principle has also been applied by this Court in interpreting state law in the context of federal antitrust laws, (See, *Midcal, supra*, 445 U.S. at 111-112). By ignoring the holding in *Pattersonville*, the Second Circuit improperly strayed from this Court's fundamental rule that the Federal Courts are bound by the state's highest court's interpretation of state law, *Hortonville, supra*.

Respondent's claim that reliance upon the holding in *Pattersonville* is inappropriate because "only a state statute was there involved" is without merit (Brief in Opposition, p. 12, fn. 8). Respondent fails to recognize that it is the interpretation of state law which triggers the applicability of the doctrine of state action immunity. As noted by this Court in *Southern Motor Carriers*, in evaluating the relevancy of the doctrine of state action immunity, it is necessary to first determine whether the State intended to displace competition with regulation. This requires a review of actions by the state legislature, opinions of the courts of the state or statutes promulgated by the legislature _____ U.S. _____. By definition it must be determined whether the State of New York, by enacting the regulations codified in the Public Service Law, intended to displace competition. To this question, the Court of Appeals necessarily responded in the negative because it held that regulatory action by the Commission did not affect the operation of the State's antitrust laws, even where the Commission had approved the challenged behavior.

Even the majority of the Second Circuit recognized the wide implications of the holding in *Pattersonville* and the fact that the New York Court of Appeals had "interpreted the application of the state antitrust laws differently" (Pet. App., p. 25a, fn. 7). The Second Circuit, in obvious departure from established precedent, decided not to defer to the ruling of the New York Court of Appeals; nevertheless, there was the full recognition that the ruling in Pattersonville directly addressed the crucial issue of whether it is the public policy of the State to displace competition in the telephone industry.

The ruling of the Second Circuit, imposes and substitutes its own interpretation of state law which directly conflicts with the interpretation developed by the New York Court of Appeals. This violates established precedent set by this Court which binds Federal Courts to accept interpretations of state law by the highest Court of the state, *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971), and should be resolved by this Court.

B. Respondent Has Failed To Demonstrate That The Anticompetitive Conduct Challenged Here Was Actively Supervised By The State.

This Court reaffirmed its longstanding position that the second prong of the *Midcal* test is both applicable to private parties and an indispensible element to a determination that the state action exemption is applicable, *Southern Motor Carriers*, _____ U.S. _____.[1] As explained by this court, "a private party may claim state action immunity only if both prongs of the *Midcal* test are satisfied", *Southern Motor Carriers*, _____ U.S. _____. This followed the reasoning advanced in *Midcal*, in which this Court stated:

> The national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state

[1] *Midcal*'s second prong was not reviewed by this court in either of its recent rulings. In *Town of Hallie v. City of Eu Claire*, _____ U.S. _____, No. 82-1832, issued March 27, 1985, this court found the second prong of the *Midcal* test inapplicable to municipalities, and therefore not a prerequisite to exemption from the antitrust laws where the action is by a municipality rather than a private party, *Hallie*, _____ U.S. _____. The second half of the *Midcal* test was not reached in the *Southern Motor Carriers* case since both parties stipulated and conceded that, under the facts there, active supervision of the anticompetitive conduct existed. _____ U.S. _____.

> does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . ." *Midcal*, 445 U.S. at 106 citing, *Parker*, 317 U.S. at 35.

No active supervision of respondent's anticompetitive activities exists. Neither the respondent nor the Second Circuit have demonstrated that New York State, for example, actively monitored the division of revenues or appropriate EAS settlements.[2] This left the Second Circuit to review *Midcal*'s second prong based upon general regulations and statutes rather than specific activities undertaken by the State. Thus, the unresolved question still remains whether the Second Circuit's position that general regulatory rate-making policies that it found satisfied *Midcal*'s first prong will also meet *Midcal*'s second prong in light of the fact that no active supervision of the challenged anticompetitive conduct exists. Petitioners believe it cannot and therefore urge this court to grant certiorari to resolve this issue which remains at odds with prior rulings of this court relating to the second prong of the *Midcal* test.

C. The Official Regulatory Policy Of New York State Favors The Promotion Of Competition In The Telecommunications Industry.

Respondent basically concedes that the official regulatory policy of New York favors the growth of competition in the field of telecommunications. It nonetheless argues that since regulation of the provision

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[2] Respondent asserts that the PSC has considered division of revenues or EAS settlements because they were included in the list of grievances submitted to the PSC (Brief in Opposition, p. 14, fn. 9). This argument is not persuasive. As the Court of Appeals held in *Pattersonville*, "the record convincingly demonstrates that plaintiffs did not have a full and fair opportunity to contest the issue before the PSC" (56 N.Y.2d at 20). Furthermore, mere "consideration" does not rise to the level of active supervision.

of local exchange service by landline telephone companies has still been retained, granting immunity from the antitrust laws would not violate the policy of New York, nor conflict with the principle of federalism (Brief in Opposition, pp. 16-17). This contention is illogical.

It remains unrefuted that violations of the antitrust laws and the elimination of competition would undermine the state's efforts to foster competition. Although there are sectors of the industry where regulation is still in force, this cannot support the position that the regulated sectors may engage in anticompetitive behavior against competitors in the regulated and non-regulated areas.[3] In other words, the provision of basic exchange service by a landline telephone company may still be regulated; such regulation will not authorize a landline telephone company, such as the respondent, to engage in anticompetitive behavior against other landline telephone companies or competitors.

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[3] It is noteworthy to observe that there was no declaration by the Legislature in its decision to deregulate telegraph corporations and in its decision to deregulate radio telephone utilities that it desired to displace competition in those areas where regulation was retained. This is especially important with respect to the more recent action by the Legislature deregulating radio telephone utilities, which occurred *after* the issuance of the *Pattersonville* decision (Chapter 564 of the Laws of 1984). Had any conflict existed between the intent of the Legislature and the holding in *Pattersonville*, the Legislature would have noted and resolved the inconsistency in its recent legislation.

Conclusion

This Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

KEITH J. ROLAND
(Counsel of Record)

USHER FOGEL
EMILIO A.F. PETROCCIONE
Attorneys for Petitioners
1 Columbia Place
Albany, New York 12207
(518) 434-8112